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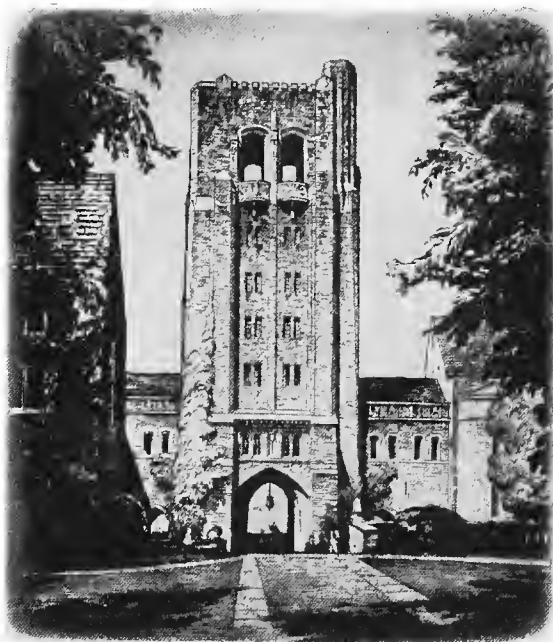
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ELEMENTS  
OF THE LAW OF  
REAL PROPERTY

WITH  
LEADING AND ILLUSTRATIVE CASES

BY  
GRANT NEWELL  
PROFESSOR OF THE LAW OF REAL PROPERTY IN THE CHICAGO-KENT COLLEGE OF LAW.  
(LAW DEPARTMENT OF LAKE FOREST UNIVERSITY.)

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## PREFACE.

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This book is designed primarily for the use of students of the law, and is largely an outgrowth of the experience of the author in the class-room. A text-book of this scope on so profound a subject can be little more than a guide to the student and an assistant to the instructor. The method of teaching the subject in hand adopted by the author, and in accordance with which this book was prepared, embraces the lecture, quiz and case systems in the endeavor to utilize the manifest advantages of each. The superiority of a systematic course of lectures over occasional and unconnected explanations must be apparent. Nothing else can properly perform the functions of quizzes and tests, both oral and written. The study of illustrative cases impresses the student with the application of principles by the courts, thus demonstrating to him their standing as matters necessary to his knowledge of the law.

The aim of the author throughout the book has been toward simplicity. The broad lines laid down by Blackstone, Cruise, Williams, Washburn and Kent have been closely followed. As indicated by its title, this book aspires to nothing more than a consideration of the foundation principles of an intricate subject, and this in as simple a manner as possible, with the end in view of stimulating the interest of the student, thus lightening and at the same time rendering more effective the labors of the instructor.

The author attempts no new or original view of the law of real property, and touches but incidentally upon what, for want of a fitting appellation, has come to be known as the "Modern Law of Real Property," believing that, as both

cannot well be acquired at the same time, the beginner should master the *theory* before undertaking the acquisition of the *art*. It is the earnest hope of the author that his work may be of assistance to students in their investigations of a branch of the law so generally approached by them with feelings of apprehension, and too frequently quitted with convictions of doubt and uncertainty.

GRANT NEWELL.

*Chicago, November 1, 1901.*

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ELEMENTS  
OF THE  
LAW OF REAL PROPERTY

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PART I.  
ESTATES AT LAW.

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CHAPTER I.  
THE NATURE AND DISTINGUISHING FEATURES OF REAL  
PROPERTY.

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**§ 1. Antiquity of this branch of the law.**—The existence of individual rights and interests in real property seems coeval with that of civilization, Holy Writ and the works of Josephus and of Rollins regarding the idea of such ownership in separate and distinct portions of landed property as having existed from the earliest period of which we may obtain authentic account. We must, however, look upon the law of real property as a *growth*, not a *creation*, and hence, in order to gain a perfect understanding of the subject, we must endeavor to ascertain the sources from which the system known as the law of real property of the present day arose.

**§ 2. Origin and foundation of our law.**—The law of real property in the United States has its foundation in the common law of England, the civil law of Rome, certain enactments of the parliament of Great Britain, and numerous legislative enactments, both state and federal, of our own country.

Strictly speaking, the common law of England is the unwritten law, and is based upon custom, general understanding, and consent so long acquiesced in that the mind of man runneth not to the contrary.<sup>1</sup> But when we speak now of the common law, we include as a part of it many statutes enacted by parliament, which are of course written laws. We also make use of the expression to distinguish *legal* from *equitable* (or *chancery*) jurisprudence, the other great division of our judicial system. The civil law is the name given to the body of the law of ancient Rome, and traces of its influence, and indeed many of its enactments, are to be

<sup>1</sup> Black. Comm.

found in our laws even at the present day.<sup>1</sup> The early common law was rich in provisions concerning real property because early England was an agricultural nation. The civil law dealt more especially with personal property, and we find a reason for this in the fact that the Romans were essentially a trading and commercial people, and paid no great attention to tilling the soil and kindred pursuits.

**§ 3. English law under the Saxons.**—From what has been said it naturally follows that the law of real property as we know it to-day is founded chiefly upon the English law. If we turn to our histories we will find that the rule of the Saxon race came to an end in England about the middle of the eleventh century.<sup>2</sup> Then it was, too, that the system of land holding, which was the immediate forerunner of our own, was formally introduced into England by William of Normandy, commonly known as William the Conqueror. This system, so introduced by William, is known as the Feudal System. Saxon England, while perhaps recognizing the feudal system to a limited extent or adopting it in a modified form, had laws governing the proprietorship of landed property based on entirely different principles from those underlying the feudal system. It appears that under the Saxons both absolute ownership and free alienation by will and by deed were constantly upheld; that lands were not generally grouped into great estates, ruled over by a single lord as the representative of the king, but very often into farms and commons which were owned jointly or in severalty by the free men who inhabited the country—a state of affairs quite inconsistent with the principles of the feudal system.<sup>3</sup>

**§ 4. Principles of the feudal system.**—This feudal system as introduced by William was of purely military and despotic origin, having for its basic principle the theory that

<sup>1</sup> For example, see Rev. Stat. Illinois, ch. 39, "Descent," wherein the civil, and not the common, law is followed.

<sup>2</sup> See Green's History of the English People.

<sup>3</sup> See *post*, § 4.

the primary title to all landed estates was vested in the crown,<sup>1</sup> thus preventing both absolute ownership and free alienation by individuals. Under this system lands were granted by the crown not to be *owned*, but to be *held*; and in return the one upon whom the grant was conferred was required to render some service, usually of a military nature, to the crown. Herein is the origin of the word "tenant" (Latin *teneo*, to hold), which is still made use of to denote one who is the owner of an interest in landed estates.

§ 5. **General principles of ownership.**—As the subject of the feudal system and the tenures arising thereunder will be treated of at length in a subsequent chapter, we will now leave it for the present, and enter upon the consideration of those principles upon which all individual rights and interests in landed estates are based; and first among these is the signification, in law, of the word *property*.

§ 6. **Legal signification of terms.**—Many words and expressions in common use, when embodied in the language of the law, are there given a distinct, and oftentimes quite a different, signification, and so it is with this word *property*. When used in its ordinary sense it signifies that which a person possesses and with which he may do whatsoever he pleases. But when used in the law it purports and involves the idea of ownership,<sup>2</sup> and this word implies that the person possessing the object thereof has the exclusive right to the enjoyment of the same; and our system of laws undertakes to protect him in the exercise of such right of enjoyment as against all persons who without legal justification seek to hinder him therein or to deprive him thereof.

§ 7. **Nature of ownership.**—Now ownership as a matter of law may be absolute or otherwise. So one is said to be the *owner* of property although his possession may not include all the attributes of absolute ownership.

§ 8. **Qualities of absolute ownership.**—An absolute ownership imports the rights of free enjoyment and free disposi-

<sup>1</sup> Co. Lit. 65a.

<sup>2</sup> Will. R. P. (17th Int. ed.), pp. 1, 2.



tion and the quantity of indefinite duration in point of time.<sup>1</sup> Any possession which is lacking in one or more of these particulars is called in law a restricted, limited or qualified ownership. But in either case it is only a question of degree; and the owner, whether he be absolute or otherwise, will be protected in the enjoyment of such rights as he may have in the object of his ownership.

§ 9. **Corporeal and incorporeal property.**—The common law, following in this respect the civil law of Rome, divides all things in which individuals may acquire rights of ownership into two classes — corporeal and incorporeal. Corporeal things are such as are of a tangible nature, as lands, cattle, goods, etc.; while incorporeal are those of such a nature that they are not discernible by the exercise of our natural senses, as mere legal rights and obligations, annuities, and the like.<sup>2</sup>

§ 10. **The two kinds of property.**—Property, then, may consist of tangible things in the possession of the owner, or of certain rights of an intangible nature which are of value. So a man may be the owner — that is, have property rights — in lands, cattle, goods, etc.; or his property may consist in mere rights, as, for instance, debts due to himself, which are susceptible of being converted into money or otherwise made to bring profit to the owner.

§ 11. **Tenure — Allodial and feudal distinguished.**—As a necessary consequence of the adoption of the feudal system, we find that under the English law a man could be possessed of no absolute ownership in lands, the primary title to all lands being vested in the crown, and no method provided by which it may divest itself thereof. It is determined by the weight of authority, however, that the feudal system, as an institution, was never in force in the United States, and that our land tenures are *allodial* as opposed to feudal; by which is here meant that while title to all lands in this country is primarily vested in the sovereign power, that power may by

<sup>1</sup> Will. R. P. (17th Int. ed.), p. 3.

<sup>2</sup> Hale, Analysis, 46-50.

proper gifts or conveyances divest itself of such title and transfer the same to individuals. Both Kent and Washburn support the proposition that our tenures are allodial; but Sharswood is of the other opinion, advancing as his reasons therefor the well-established power of the government to take the lands of individuals for public use, the non-payment of taxes, etc. But it may be said that in no instance (save only perhaps in case of war) can the government assume to exercise such power except in some manner provided by law and involving a judicial determination of the rights of the individual; and the fact that such proceedings at law must be resorted to is in itself, perhaps, the most conclusive proof that the government has no title to lands paramount to or essentially differing in its nature from that which individuals are capable of acquiring. The powers of this sort which may be exercised by the government are those only which are necessarily incident to the proper fulfillment of its various functions. These powers do not arise by reason of the fact that the government is vested with paramount title to all lands, but are established and exercised solely on grounds of public policy. We may conclude, therefore, that in the United States one may have as absolute ownership in lands as he may in any other sort of property.

§ 12. **Terminology.**—But while our law thus denies certain of the principles of the feudal system, it accepts its terminology; and this, if there were no others, would afford a sufficient reason for the necessity of an understanding of it on the part of the student, as he will constantly meet with words of which the signification will not be apparent without such understanding. Thus, the interest or property which one has in lands is designated an *estate*, and when used in connection with proper words of qualification or limitation, such as *in fee*, *for years*, etc., this word “estate” denotes both the nature and the extent of such interest or property. We are thus enabled by the use of a few words to indicate both the *quality* and the *quantity* of the interest or property one has in lands.

**§ 13. Importance of familiarity with the terminology.**

The importance of becoming familiar with what may be called the terminology of the law of real property should be borne in mind by the student at the very outset of his work, for a thorough understanding of the legal purport of the terms made use of in this branch of the law will assist him to no small extent in mastering the principles of the subject.

**§ 14. Property, real and personal.**—Having acquired some understanding of what is meant in the law by the terms *property* and *ownership*, and having seen that the first great division of all objects of ownership is into things corporeal and incorporeal, let us now proceed to a consideration of the second classification of property, which we find to be expressed by the words *real* and *personal*.<sup>1</sup> The distinction between these two kinds of property is of prime importance and oftentimes gives rise to questions of great difficulty. If it were true, as the casual observer might well conclude, that all *movable* property is personal in its nature, while under the term “real property” are embraced and included *all things immovable*, the solution of the questions arising on this point would be quite a simple matter. But not being true, the foregoing proposition cannot materially assist us in the determination of such questions, and hence we shall, for the present, disregard the distinction sometimes made in the books between movable and immovable property, as affording us no reliable test by which we may distinguish between real and personal property.

**§ 15. Distinctions between real and personal property.**

As a matter of fact, we shall find that property, movable in its nature, and, as the older text-writers were wont to say, “capable of accompanying the person of its owner,” very often, by reason of certain acts of its owner, becomes an integral part of the realty, and hence real, and not personal property, as it was before the doing of such acts.

Whether property is real or personal is a mixed question

<sup>1</sup> Maine, *Ancient Law*, 273-277.

of law and fact, to be governed, of course, by certain well-established rules applicable to the state of affairs disclosed by the evidence in each particular case. There is not, nor can there be, any universal rule of law for determining this question.<sup>1</sup>

§ 16. **Origin and cause of this distinction.**—During the formative period of the common law the English were essentially an agricultural people. Property in land was therefore considered of the first importance. The holdings which men had in personal property were chiefly in such goods and chattels as appertained to the tillage of the soil, and ownership of such property was deemed of secondary importance. All real property has its foundation in lands, and all things which are not land can become a part of the realty only by connection or association therewith in some manner recognized by the law.

§ 17. **Origin, etc., continued.**—Now, proceedings at law were at an early date divided into actions real, actions personal, and mixed actions; that is, actions concerning real property, actions concerning personalty, and actions wherein both real and personal property were involved. The distinction here made in these actions at law arose largely out of the physical differences between land and all other species of corporeal property. Land, by which is now meant the soil of the earth, is immovable and incapable of destruction; so if an action were to be brought concerning land, the place where such action should be brought was fixed by the location of the land, and if one had been unlawfully dispossessed of his land he could in such action recover possession of the *land itself*. But goods and chattels, considered separately and apart from land, were neither fixed in their location nor incapable of destruction; and so when one was unlawfully deprived of his possession thereof, it oftentimes happened that the only redress which the law could afford him was not the restoration of *the thing itself*, but the *assessment of damages*

<sup>1</sup> Digby, Hist. Real Prop., App., sec. 1.

in money against the wrong-doer. It therefore very naturally followed that the nature of any property in question, that is, whether real or personal, was determined by the character of the proceeding in which the owner might have redress for interference with his possession thereof, and by the form of the redress therein afforded him by the law.

§ 18. **Origin, etc., continued.**—These proceedings at law were named, as heretofore stated, real actions and personal actions; not primarily for the reason that the former was resorted to in cases where the controversy concerned real, and the latter personal property, but because in the former the owner, by the judgment of the court, was always capable of being again restored to the possession of the property itself, that is, of the *real* thing; while in the latter, owing to the movable and destructible nature of the property involved, he might be compelled to accept in lieu of the property itself a judgment for damages, running against no particular property, but against the wrong-doer *in person*.

§ 19. **Origin, etc., concluded.**—Bearing in mind that it was *land*, and land only, which could always be thus restored to the owner, it being immovable and indestructible, we have it as the *real* thing to be recovered, as above set forth, and hence its appellation of *real* property or *real* estate. Applying the same course of reasoning to those objects of ownership which do not possess the attributes of land, and rights in or concerning which were adjudicated in personal actions, as heretofore shown, we can readily understand how such objects of ownership came to be known in the law as personal property.<sup>1</sup>

§ 20. **Importance of this distinction in our law.**—The foregoing may serve to give the student some idea of the origin of the distinction made in the law between real and personal property, and, it is hoped, thus aid him to a fuller understanding of what is sought to be further explained

<sup>1</sup> Will. Real Prop. (17th ed.), 23.

herein when we come to discuss the rules of law applicable to lands, tenements and hereditaments. In general, it may be said that this distinction between realty and personalty, modified by the lapse of time and changed conditions, is still observed; and notwithstanding the numerous forms of property, both real and personal, which are of modern creation, a man's estate, as a whole, is at the present day made up of property which is known in the law as either real or personal.<sup>1</sup>

**§ 21. Lands, tenements and hereditaments — Signification of the word "land."**— Land, in the ordinary sense of the word, means the soil or surface of the earth, but in a legal sense the word has a much broader signification. As made use of in the law, the term "land," in general, comprehends not only any ground, soil or earth whatsoever, but includes all things of a permanent and substantial nature, not only on the face of the earth, but everything of that nature under it or over it.<sup>2</sup> And he who is the owner of land owns both upward and downward from the surface, indefinitely.<sup>3</sup> Thus, a pond is described in law as so much land covered with water, and minerals under the surface of the earth are a part of the land. The term "land" embraces as well whatever is permanently attached thereto, and that whether the attachment has come about through natural means, as in the case of trees and herbage, or by the hand of man, as in the case of buildings and structures of various kinds.<sup>4</sup>

**§ 22. Land further defined and distinguished.**— To leave the subject at this point would, however, be misleading, for it sometimes happens that things permanently at-

<sup>1</sup> The classification into "mixed" property is now practically disregarded. The ancient rules of law regarding heirlooms are no longer in force, and fixtures, chattels-real, etc., are the terms now made use of to indicate those things which

were formerly classed as mixed property.

<sup>2</sup> Co. Litt. 4a; 2 Blk. Comm. 18; *Canfield v. Ford*, 28 Barb. 336 (N. Y. Sup. Ct.).

<sup>3</sup> 2 Blk. Comm. 18.

<sup>4</sup> Wash. R. P., vol. 1 (5th ed.), p. 4.

tached to the soil are not land and so do not pass by a conveyance of land *eo nomine*. Thus, growing crops, when they are the property of the owner of the land, are a part thereof.<sup>1</sup> But when such crops are the property of a lessee of the land, they are personalty.<sup>2</sup> The same may be said of buildings erected with the consent of the owner of the land by a person intending to remove them at some future time; but crops sown or buildings erected without such consent become a part of the realty.<sup>3</sup> Similar questions may arise with reference to growing trees and the products thereof — ice, manure, property annexed to or fitted for use upon the realty (usually designated as trade fixtures), the rolling-stock of railways, etc. But as the determination of these questions is largely regulated by statute in the various states, there is, or can be, no universal rule of law to guide us. The student is advised, in connection with this subject, to make careful examination and study of the several leading cases cited in the note below.

**NOTE.—Trees and other natural fruits.**—May be either realty or personalty. Generally realty, and pass by conveyance thereof. *Hutchins v. King*, 1 Wall. 53. They so pass even if cut or blown down. *Bracket v. Goddard*, 54 Me. 309. But not if cut into logs or timber by owner. *Cook v. Whiting*, 16 Ill. 480; *Kingsley v. Holbrook*, 45 N. H. 313. As to this question when arising between lessor and lessee, see *Adams v. Beadle*, 47 Iowa, 439. The one on whose land the trunk of the tree stands is its owner. *Dubois v. Beaver*, 25 N. Y. 123. Where tree stands on dividing line, owners of adjacent properties are tenants in common of the tree. *Griffin v. Bixby*, 12 N. H. 454. Sale of standing trees is sale of interest in land. *Buck v. Pickwell*, 27 Vt. 157. Growing trees are presumptively a part of the realty, but their status may be changed by contract. *Slocum v. Seymour*, 36 N. J. Law, 138.

**Growing or matured crops.**—When sold separate from the land, they are personalty (*Graff v. Fitch*, 58 Ill. 373), and they may be taken on execution against personalty. *Preston v. Ryan*, 45 Mich. 174. At death of owner they pass to personal representatives. *Pattison's Appeal*, 61 Pa. St. 294 *et seq.*

**Ice.**—Upon private waters is part of realty of owner of land beneath. *Washington Ice Co. v. Shortall*, 101 Ill. 46. But sale of ice sepa-

<sup>1</sup> *Coman v. Thompson*, 47 Mich. 22.

<sup>3</sup> *Freeman v. McLennan*, 26 Kan.

<sup>2</sup> *Powell v. Rich*, 44 Ill. 466.

151; *Dame v. Dame*, 38 N. H. 429.

rate from land is sale of personalty. *Higgins v. Kusterer*, 41 Mich. 318. When formed on navigable streams, belongs to first taker thereof. *Wood v. Fowler*, 26 Kan. 682. But see *contra*, *People's Ice Co. v. Steamboat "Excelsior"*, 44 Mich. 229.

**Manure.**—In general a part of realty and passes as such. *Wetherbee v. Ellison*, 19 Vt. 379. But may be personalty under some circumstances. See *Corry v. Bishop*, 48 N. H. 146; *Gallagher v. Shipley*, 24 Md. 418; *Ruchman v. Outwater*, 28 N. J. Law, 581.

**Rolling stock of railroad companies.**—Largely regulated by statutory and constitutional provisions in the various states. *Sword v. Law*, 122 Ill. 216, 1 Wis. Ann. Stat. (S. & B.), sec. 1838. Is personalty by constitutional provision in Mississippi, Nebraska and Texas.

**Mining claim.**—When perfected is realty. *McTeters v. Pearson*, 15 Colo. 201.

**High-water mark.**—Is the limit of government grants. "Land" does not include that covered at low, and uncovered at high, water mark. *Baer v. Heron Bros. Co.*, 2 Wash. 586.

The statutes of some states enlarge upon the common-law definition of land. See those of Georgia, Massachusetts and New York.

The student is further advised that recourse should be had in every case to the statutes and decisions of the state in which the cause of action arises. The citations given herewith can hardly serve in any other capacity than that of illustrating in a general way the trend of the law on these questions.

**§ 23. Fixtures.**—Before dismissing the subject we must, however, consider somewhat more at length the principles governing certain articles of corporeal property, which under some circumstances are a part of the realty, while under others they are personal property. Such articles are known as *fixtures*. It is perhaps impossible to formulate an exact definition of this term, and no doubt it will serve our purpose as well to become familiar with the principles of law regulating the questions arising in connection with this sort of property. We may say, however, that a fixture is an article of property, personal in its nature, but which from its situation or connection with the realty, and under the circumstances of the case, has for the time being lost its character as personalty and become accessory to the land and parcel of it. To become a fixture such property must be either actually or constructively attached to the realty, or fitted and suitable for use thereon or in connection there-



with, and it must be so annexed to or placed upon the realty with the intention on the part of its owner of making it a permanent accession to the freehold.<sup>1</sup>

§ 24. **Fixtures, continued.**—The tests by which we may determine whether in a given case a certain article is a fixture are so admirably set forth by a well-known writer on the subject that we cannot do better than to quote his language: “The weight of modern authority and of reason, keeping in mind the exceptions as to constructive annexation admitted by all authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests: 1. Real or constructive annexation of the article in question to the realty. 2. Appropriation of adaptation to use or purpose of that part of the realty with which it is connected. 3. The intention of the party making the annexation to make the article a permanent accession to the freehold. Of these three tests the clear tendency of modern authority seems to be to give pre-eminence to the question of intention. The others seem to derive their chief value as evidence of such intention.”<sup>2</sup> An examination of the cases cited below may be of profit.<sup>3</sup>

§ 25. **Tenements.**—A tenement comprises everything which may be so held as to create a tenancy in the feudal sense of the word.<sup>4</sup> The word *tenement* is therefore of wider meaning and extent than *land*, since it includes not only land, but rents, commons and other rights and interests of similar nature issuing out of or concerning land.<sup>5</sup> But nothing is a tenement which is not of a permanent nature.<sup>6</sup> A parcel of land with its appurtenant rights in the possession of any person was known in the early law as a ten-

<sup>1</sup> Will. R. P. (17th Int. ed.), p. 39.

<sup>2</sup> Ewell on Fixtures, pp. 21, 23.

<sup>3</sup> Walker v. Sherman, 20 Wend. 636; Manwarring v. Jennison, 27 N. W. R. (Mich.) 899. See also note to Overman v. Sasser, 10 L. R. A. 722.

<sup>4</sup> Lord Mountjoy's Case, 4 Burr. 265.

<sup>5</sup> 1 Steph. Comm. 158.

<sup>6</sup> 2 Blk. Comm. 17.

ement, the term being then generally used in the mere sense of a holding of land without any reference to the nature of the tenant's interest therein.<sup>1</sup> The same word afterwards came to be employed in a special sense as referring to freehold lands only, and at the present time, when the word "tenement" is used, a freehold estate in lands<sup>2</sup> is indicated, together with the certain rights and privileges, above referred to, which may be appurtenant to the particular estate in question.

§ 26. **Hereditaments.**—The term "hereditaments" is a still more comprehensive one than either lands or tenements, for it includes everything which is capable of inheritance, whether corporeal or incorporeal.<sup>3</sup> This classification into corporeal and incorporeal is of particular application when used in connection with the term "hereditaments," a corporeal hereditament indicating lands or tenements in the possession of the owner, an incorporeal hereditament mere rights in or over land in the possession of another, but which are nevertheless, from the circumstances of their association, of the nature of real rather than of personal property.

§ 27. **Meaning of "inheritance."**—By *inheritance* is meant the taking of property, on the death of the owner, by the person who is by the laws of descent designated as the one so to take, and such person is called the heir. Upon the death of the owner, property personal in character passes to the personal representatives of the deceased and not directly to the heir. Such property is therefore, in this sense of the word, incapable of inheritance, and hence is not included in the term "hereditament" except in cases where, by virtue of its association with the realty, it is considered as a part thereof and so passes to the heirs.

§ 28. **Modes of alienation of hereditaments.**—The distinction made in the law between the rights of persons in actual possession of the objects of ownership on their part,

<sup>1</sup> Will. R. P. (17th Int. ed.), pp. 15, 21.

<sup>2</sup> For explanation of freehold estates, see p. 29, *post*.

<sup>3</sup> Canfield v. Ford, 28 Barb. 336.

and of persons who were not in such possession, led to a difference in the mode of alienation applicable to corporeal and incorporeal hereditaments. Corporeal hereditaments were alienable (at the early law) only by *feoffment*, that is by a gift of the feud together with what was known as *livery of seisin*, by which is meant a formal delivery of possession.<sup>1</sup> In regard to incorporeal property it is evident that there could be no actual delivery of the possession of the thing itself, so recourse was had to writing, and the transfer of the title to incorporeal hereditaments was effected by the making and delivery of an instrument under seal, or deed of *grant*. Hence corporeal hereditaments were said to lie in *livery*, and incorporeal in *grant*.<sup>2</sup> Though the necessity for the ceremony of livery of seisin has long since ceased, and both corporeal and incorporeal hereditaments may now be said to lie in grant, we can still trace the effects of this ancient mode of alienation in the law as it stands to-day. The actual possession of land is yet regarded in many cases as the best evidence of ownership in him who holds such possession.

**§ 29. Lands, tenements and hereditaments distinguished.**—Land is both a tenement and an hereditament, and a tenement may or may not be an hereditament. A tenement and land may be distinct things, and an hereditament (as an annuity in fee) may be neither land nor tenement. Thus it becomes necessary, when we desire to indicate with exactness *all* those things which are the objects of ownership in landed property, to make use of the three words — lands, tenements, and hereditaments.

<sup>1</sup> Co. Litt. 9a, 48a.

<sup>2</sup> Will. R. P. (17th Int. ed.), p. 31.

## CHAPTER II.

### TENURES AND ESTATES IN GENERAL.

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- 57. Power of free alienation extended to lesser estates.
- 58. Concerning estates as to quantity.
- 59. The quantity of various estates.

§ 30. Nature of tenure.— We are already aware that in the English law no individual could have an absolute ownership in landed property. He could acquire only a *holding*, and was consequently termed a *tenant*.<sup>1</sup> Now when one thus

<sup>1</sup> 1 Poll. & Mait. Hist. Eng. Law, 210–217, sec. 1; Co. Lit. 65a.

holds property under the feudal system, he of necessity so holds it upon some arrangement or agreement with the paramount owner of whom he obtains the holding. The relation thus existing between the tenant and the one whose tenant he is has long been designated in the law as *tenure*.<sup>1</sup> Since the nature of this tenure was dependent upon an arrangement or agreement,<sup>2</sup> it is quite to be expected that tenures of various sorts should have existed, the quality and nature of each depending upon the agreement or arrangement entered into between the grantor of the holding and the tenant thereof.

§ 31. Principles of the feudal system.—In order that we may obtain an understanding of this important subject of tenures we must examine somewhat at length certain of the principles of the feudal system of land holding. And first, tenures in the law are either allodial or feudal. Under the former an individual may acquire a complete and absolute property; he *owns*, not merely *holds* it, free from all control of any other person.<sup>3</sup> Under the feudal system, or feudal tenure, land was held upon certain services to be performed for the lord by the tenant, who was to a large extent subject to the control of such lord. A *feud* was the name given to a tract of land *acquired* by the voluntary and gratuitous donation of a superior, and held on condition of fidelity and services.<sup>4</sup> At first the duration of feuds was entirely dependent on the pleasure of the lord, as he might resume them at will, but gradually the holding came to be for a year, afterwards for life, and finally inheritable.<sup>5</sup> The vassal could not alien without the consent of his lord, and, on the other hand, the lord, having taken upon himself certain obligations toward the vassal, could not alien without his consent. And if the vassal were evicted

<sup>1</sup> Co. Lit., 1a; 2 Blk. Com. 59.

<sup>3</sup> Greenl. Cruise, Dig., p. 6.

<sup>2</sup> Usually for the holding of the lands upon the performance of certain services of a personal nature by the tenant.

<sup>4</sup> Greenl. Cruise, Dig., p. 6; Digby, Hist. Law of R. P., ch. 1, sec. II; 2 Blk. Com. 104, 105.

<sup>5</sup> Greenl. Cruise, Dig., p. 16.

the lord was obliged to give to him other lands of equal value or to pay to him the value of the feud so lost.<sup>1</sup> But in the course of time the rights of the tenant were enlarged and the powers of the lord diminished, until these feuds gradually acquired the chief characteristics of the modern estates.

**§ 32. Origin of the feudal system.**—The origin of the feudal system is generally accredited to the German or Teutonic tribes which inhabited the northern part of Europe. From this source the system spread throughout the greater part of continental Europe. It will be observed how very well it was adaptable to the case of conquered peoples, giving as it did so great a dominion over landed property to the conqueror, yet leaving the actual possession of their ancient holdings to the vanquished. It was the custom of the conquering nation to compel grants of all the lands of the vanquished to be made to the sovereign of the victors, and he then made gifts of such lands as he saw fit to such of the conquered peoples as he desired, upon their taking the oath of allegiance and promising the performance of services for him in accordance with the principles of the feudal system, reserving always to himself the rights of forfeiture, escheat, etc. Such victorious sovereigns also found in this system a very convenient means of rewarding their favorites by gifts of lands which had accrued to them by their conquests.

**§ 33. Introduction of feudal system into England.**—William, coming as he did from the vassal state of Normandy, was familiar with the workings of this feudal system, which at the date of his conquest of England had been in vogue for centuries among the German tribes and other nations in the north of continental Europe. Nothing was more to be expected than that he should entice followers to his standard, when raised for the proposed invasion of England, by promising to parcel out the lands of the Saxons

<sup>1</sup> Perhaps this was the origin of our modern warranty of title.

according to feudal tenure, among those who should be with him when he had made his footing sure and his conquest complete on the shores of that country.

§ 34. **Method adopted by William.**—When William parceled out the lands over which he had gained dominion by virtue of his conquest of the English, there were two classes of his followers whom he desired especially to favor. These were his chief spiritual advisers and his foremost military adherents. To each of these classes he displayed his gratitude by making to their individual members, or for such purposes as such members desired to indicate, gifts of portions of the lands of the conquered people. Each of these classes had its particular form of arrangement or agreement, upon which the gifts to it were made and held, and so at the very outset two sorts of tenure were created, known in the law as ecclesiastical tenures and lay tenures. With the former we shall concern ourselves but little; with the latter in its various modifications and forms we shall have much to do.

§ 35. **Free tenures.**—Both ecclesiastical and lay tenures were *free* tenures, that is to say, they were of such nature that, after the establishment of courts of law and the appointment of permanent judges to preside thereover (about A. D. 1154), one holding by either of these tenures might have his action in such courts to recover back his holding in case he was unlawfully dispossessed thereof. But we must understand that there were other gifts made by William at this time which were not free tenures, that is, not made upon free tenure nor to be held thereby; so, for instance, was tenure in villainage, which was of a lower order, and in which the tenant was not endowed with the rights and privileges of him who held on or by a free tenure. This secondary form of tenure we shall practically disregard, as it would seem to have no place in our modern law.<sup>1</sup>

<sup>1</sup> So with the estate known in the English law as a copyhold, it having no counterpart with us.

§ 36. **Divisions of lay tenures.**—Lay tenures were of two principal sorts — knight's service and socage. One holding lands either by knight's service or in socage was called a tenant *in capite* — that is, a chief tenant. Knight's service was considered the most honorable of all tenures, and consisted chiefly in the rendering of some military service or services, by the tenant, to or on behalf of him of whom he held, and the one of whom he so held was called his lord. This species of tenure was also known as military tenure.<sup>1</sup>

§ 37. **Socage tenure.**—Socage tenure seems to have had its origin in the Saxon custom dating back to a period long before the Conquest, and was the name given to the tenure of a class of land holders, known as *liberi Sochemanni*, who resided chiefly in the northeastern portion of England. They were so called primarily from the Saxon word *soke*, which indicates that they were holders of land who were subject to the jurisdiction of their respective lords in all matters of law. Afterwards it was considered by many that the word "socage" was a derivative of the French word *soc*, the English equivalent of which is "plough." It is urged that this latter derivation of the word is the proper one because of the fact that the majority of the lands held upon socage tenure were so held on the understanding that the tenant was to till the soil and render a portion of the proceeds of such tillage to the lord. But however this may be it is of small matter. We do know that *sochemanni* were free men who held their lands upon fixed money rentals and upon certain services not of a military nature, but of a character far higher than those performed by tenants in villainage.

§ 38. **Payment of money in lieu of services.**—The services rendered upon a holding to the lord gradually came to be commuted for by payment in money, the origin of our modern system of renting, and so favorable was this method to the tenant that such holdings rapidly increased in numbers, until finally the name *socage* came to be applied to all



tenures where the service was certain, honorable and not of military nature.

§ 39. **Abolition of military tenures.**— Gradually the incidents of the services connected with the various tenures came also to be disregarded to a large extent, until at the restoration of Charles II. in the year 1645, tenancies by knight's service and *in capite* were done away with, and all free tenures became socage tenures with only the old rights of fealty and escheat remaining to the lords paramount.

§ 40. **Freehold estates.**— Considerable space has been devoted herein to this subject of tenure for the reason that it forms the chief distinguishing feature of that most important of all estates — a freehold estate. Now the word "*freehold*" is made use of to indicate the *quality* of an estate, for every estate possesses both the attribute of *quality* and of *quantity*. By the former we mean its nature, by the latter its extent. So, as to quality, estates are either of freehold or less than freehold, and tenure is the incident by which we can distinguish the one from the other.

We have seen that military tenures were abolished in the year 1645, and that only tenure by free and common socage (as it was called) remained. This was not merely a tenure, but a *free* tenure or a *free-holding*, and hence estates held by such tenure were, and still are, known as freehold estates, by which is meant an estate held under or by a free tenure. In this manner the quality of the estate is fixed, and we have only to know the nature of the tenure upon which an estate is held to determine its quality.

§ 41. **Quality and quantity.**— But inasmuch as freehold estates, though all of a like quality, may greatly vary in point of quantity, we cannot definitely indicate the interest which one has in lands by the use of the term "freehold" alone. By its use we have indicated the *quality* only, and in order to make a perfect description of the estate we must make use of some further or other term or terms indicative of the *quantity* as well.

It is apparent that one who has a freehold estate which

upon his death may pass to his heirs generally has an estate greater in *quantity* than he who has an estate of freehold capable of being taken at his death by heirs of his body only, for the latter is subject to a certain restriction with regard to the heirs who can take. So one having an estate of freehold for his own life, or for that of another, has an estate lesser in quantity than either of the two mentioned above. They are each freehold estates, because in each the quality, that is the tenure, is the same; but they differ in quantity, the first being an estate of inheritance generally, the second, of inheritance specially, while the third is not of inheritance under any circumstances.

§ 42. Estates also classified as to quantity.— Thus we see that the division of estates into freehold and less than freehold has reference to the quality only. We are now to learn, however, that estates are classified with regard to quantity as well as quality, and the necessity for such classification has been shown above. Before proceeding to a further consideration of this subject, let us gain some information regarding certain matters which are not only common to all freehold estates, but in their application serve to assist us in distinguishing one from the other.

§ 43. How estates may be acquired.— Taking up these matters in logical order, we shall first consider the question of how one may acquire estates at law at the present time. And first, one may become possessed of an estate by gift or conveyance from another during the life-time of the grantor, or the estate may be vested in him by will upon the death of the owner thereof. In the law, one taking an estate by either of these methods is called a *purchaser*. Again, one may take as an heir when his ancestor dies possessed of an estate of inheritance and makes no disposition thereof by will. In this case the person is said to take by *descent*. No matter whether one takes by a deed of gift or as a devisee under a will, his rights with regard to the estate are the same, and hence the word “purchaser” applies in either case. But when one takes as an heir, the law casts the burden of

the estate upon him, without his acquiescence, perhaps even without his knowledge; he cannot refuse it, and hence his rights are not the same as those of purchasers. So as a matter of law it is said that one takes an estate either by purchase or by descent.

**§ 44. Seisin.**— When one takes an estate of freehold, either by purchase or descent, he is said to have *seisin* thereof;<sup>1</sup> that is, the legal possession — such possession or right to possession as the law will recognize and uphold.<sup>2</sup> It is one of the principles of the common law that an estate of freehold cannot exist, even for a single day, unless this seisin be in some person. It follows that, though one may be dispossessed unlawfully of an estate, he does not lose seisin thereof, for seisin and actual manual possession are not synonymous terms.

Again, the manner in which one may enjoy his estate in possession differs; that is, the extent or freedom with which he may make use of his estate is not always the same, but varies in accordance with the nature of the estate. But the right of enjoyment, either free or restricted, is an incident of every estate in possession.<sup>3</sup>

**§ 45. Modes of alienation.**— Having seen how one may acquire an estate and what his possession thereof amounts to as a matter of law, we shall now proceed to ascertain in what manner one may dispose of an estate in possession. At the present day, one seized of a freehold estate in possession has both the right and the power to freely dispose of the same, either by gift during his life-time or by will at his death. But this power of alienation, as it is called, did not exist in the earlier days of the English law, and came not at once, but by successive steps through a long period of years. We must once more have recourse to the history of the law, and, lest the student may be doubtful of the utility of familiarizing

<sup>1</sup> Co. Lit. 200b, and Id. 266b (Butler's note, 217).

<sup>2</sup> Poll. & M., Possession, 47-49.

<sup>3</sup> Estates, the enjoyment and pos-

session of which are postponed to the future, will be treated of later in our work.

himself with so much of what no longer exists, his attention is called to the following from the pen of the learned Mr. Williams:<sup>1</sup>

“It is a constant disadvantage to any one attempting to expound real-property law, that so many matters apparently simple cannot be rightfully explained without referring to the history of law and to times long gone by. But for this very reason, real-property law affords a peculiarly instructive exercise for the student. From no other branch of the law is he likely to gain such a thorough conviction of the futility of attempting to reason about law upon instinct, without knowing how the law became what it is.”

**§ 46. Development of the power of alienation.**—The system of feudal tenure, to which we have already given some attention, and which, as we have observed, became the general condition of land-holding in England after the Conquest, was in its nature essentially restrictive of alienation by either deed or will.

Taking up first the right of a freeholder to alien his lands during his life-time, we find that under the feudal system a grant to a man and his heirs was not construed to give to him an absolute property in the land, as it would at the present, but to give to him merely a right of free enjoyment during his life-time, and to secure to his heirs the same right after his death. The heirs took an interest in the land by virtue of the gift to their ancestor, and, upon his death, they took as purchasers under the grant *to* him, and not by descent *from* him.

**§ 47. How power of alienation was defeated under feudal system.**—This, in itself, was sufficient to prevent free alienation by the tenant; for, because “a living man hath no heirs,” the persons whom he might have induced to join with him in a conveyance, or to waive their interests in his estate, and thus perfect the title in his grantee, were, as a matter of law, not yet ascertained nor in existence. But

<sup>1</sup> Will. R. P. (17th ed.), p. 142.

there was still another cause that operated to defeat the power of free alienation, and that was the interest which the lord paramount always retained in the grants of landed property, and without whose consent no valid conveyance could be effected. Nor, as we may well imagine, was it generally an easy task to gain the consent of the lord when the tenant desired to alienate; for it was precisely what was intended by the Normans, that the lands thus parceled out among their followers and favorites should remain to them and their descendants for all time.

§ 48. **The disabilities gradually removed.**—But in common with the other harsh and unjust measures of the feudal system, these restrictions upon the power of alienation were gradually done away with as the needs and demands of advancing civilization made them more and more undesirable.

§ 49. **Subinfeudation.**—The first step in the direction of free alienation was an attempted evasion of the law, but was, nevertheless, in a great measure successful. It was known as *subinfeudation*, and this consisted in the granting of the feud by the tenant thereof to another, to be held of such grantor, who was then styled the *mesne*, or intermediate, *lord*. The effect of this proceeding was to raise a new tenure between the sub-tenant and his mesne lord. As a matter of course it did not invest the sub-tenant with complete title, but it did compel the lord paramount to accept the services of the sub-tenant in lieu of those due from the one to whom the gift had originally been made. Subinfeudation was also made use of by the tenant in many instances to divide his feud among several different persons or sub-tenants, and this diversity of ownership led to great difficulties on the part of the lord paramount when he sought to enforce the services due to him. The value of these services was also greatly reduced, and in some cases, as, for instance, with regard to escheat, was practically lost.

§ 50. **Alienation as against the heir.**—The rights of the heir in the property also began to be affected, for it was held about the middle of the twelfth century that a free-

holder might grant a portion of his holding for certain purposes, and that the heir was bound to warrant the gift so made.<sup>1</sup> Again, it was held that where one took as a purchaser his power of alienation was more extensive than where he took by descent, thus adding another to the several disabilities of the heir.

§ 51. **Reasons for these changes in the law.**—It is, perhaps, impossible to assign sufficient legal grounds upon which these infringements on the strict rules of law may be based or explained; suffice it to say that the ever-growing sentiment in favor of free alienation afforded recognition to the various methods, although in their inception they were little more than mere subterfuges for evading the law.

§ 52. **The statute *Quia Emptores*.**—We should bear in mind that at the time of which we are now writing the law-making power of the English people was vested in the persons who were the very lords paramount of whom we have been speaking. So that when the various attempts to exercise the power of alienation commenced to result in loss and detriment to the lords, they were not long in enacting certain statutes for the remedying of these matters. The most important legislation along this line was a statute passed in the year 1290 (18 Edw. I.), and called from its opening words *Quia Emptores*.

§ 53. **Purpose of this statute.**—The intendment of this statute was to prevent subinfeudation by providing that, on the alienation of land to be held in fee, the alienee should hold such land of the same lord and upon the same services as the alienor held it before. With this restriction the statute recognized the right of every free tenant (except tenants by knight's service) to alien his land or a part thereof at will, but prevented the creation of any new tenures by subinfeudation.

§ 54. **Effect of the statute.**—The ultimate effect of this statute was to promote, rather than hinder or restrict, free

<sup>1</sup> Will. R. P. (17th ed.) 74.

alienation; and, taken together with the effect given to the law as announced in the rule in Shelly's case (to be explained later on in our work), secured to every person having a freehold estate of inheritance the right and the power of free alienation by gift made during his life-time.

§ 55. **The power of disposition of lands by will.**—The power of alienating lands by will was not secured till a much later period. As a general proposition, lands were not devisable at the common law, for the reason that in such case there could be no livery of seisin, which it will be remembered was a requisite to the passing of the legal title to a freehold estate. In order to exercise control over his lands after his death, it became the custom for a person, during his life-time, to make legal conveyance, with livery, to another to be held by such an one *to such uses* as the grantor should set forth or direct in his will.

§ 56. **Statute of wills.**—This indirect mode of devising title to lands was restrained by the operation of the famous Statute of Uses (of which we shall hear much later on), passed in the year 1529. But the right of every person having a freehold estate of inheritance to devise his lands freely was fully secured by the passage in 1534 of a statute known as the Statute of Wills.

§ 57. **Power of free alienation extended to lesser estates.**—The power of free alienation having been once established as to freehold estates, both *inter vivos* and by devise, it was soon extended to estates of lesser quality, so that for a long period of time all estates at law have been and are fully and freely so alienable.

§ 58. **Concerning estates as to quantity.**—We have already seen that the first great division of estates at law, as to quality, is into freehold and less than freehold. It now remains for us to follow these estates into their classifications as to quantity, or, in other words, to determine the signification and proper application of those terms which are made use of to indicate the *quantity* of estates.

§ 59. **The quantity of various estates.**— Of freehold estates there are three principal sorts as to quantity,— estates in fee simple, in fee-tail, and for life. Of estates less than freehold there is but one properly so called — the estate for years. The various estates we shall take up in their order, beginning with the greatest, and endeavor to explain the incidents of each, to the end that the student may become familiar therewith, and thus be enabled to distinguish the one from the other when practical cases arise requiring that to be done.



# ESTATES OF FREEHOLD.

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## CHAPTER III.

### ESTATES IN FEE SIMPLE.

- § 60. Importance of distinguishing between estates.
- 61. Estates in fee simple.
- 62. Seisin and possession distinguished.
- 63. Signification of the word "heirs."
- 64. Estates in fee simple, how distinguished.
- 65. Its incidents explained.
- 66. Free enjoyment.
- 67. Power of alienation.
- 68. How acquired.
- 69. Special powers of tenant in fee.
- 70. Summary.

**§ 60. Importance of distinguishing between estates.**—It is of prime importance that the student of real-property law should be able to determine what estate is created under any given form of gift or conveyance, for it is after this manner that questions arising on this branch of the law most frequently present themselves for answer. Indeed it may well be said that there are but three master problems, which when solved give understanding to all others, and these, arising out of every limitation, are (1) what estate is taken under the given limitation, (2) what may be done by the tenant in his enjoyment thereof, and (3) how or in what manner may he alien or dispose of his holding. To solve these problems we must be able to clearly distinguish between the various estates, and we can do this only by becoming familiar with their several characteristics and incidents, whereupon, by applying this knowledge, we can, by an inspection of the form of the grant, ascertain what estate is

created, and also determine who is entitled to take the same and the rights, powers and obligations of the taker thereof.

§ 61. **Estates in fee simple.**—Considered from the standpoint of both quality and quantity, the greatest interest which one may acquire in landed property is an estate in fee simple.<sup>1</sup> It derives its name from the word *feud*, of which *fee* is a synonym, used to express the quantity of the estate,<sup>2</sup> the word *simple* being added to indicate that it is a pure or proper feud, that is, one without legal restrictions as to any of its incidents, thus distinguishing it from a base or qualified fee.<sup>3</sup> Every fee simple is in quality a freehold estate of inheritance generally, the form of the limitation creating it being in every case to one and his heirs.

§ 62. **Seisin and possession distinguished.**—When an estate is limited by deed to a man and his heirs, or to him during his life and then to his heirs, an estate in fee simple passes, and the grantee is said to be seised in his demesne as of fee. It will be noticed that we do not speak of an *estate* in property purely personal in its nature, for with regard to that species of property one is said to be *possessed*, not seised; nor did a feud ever exist except with reference to real property. The only interest in personal property capable of being taken at the common law was an absolute ownership, of which possession was the chief incident. So that when an *estate* is spoken of, reference is always had to an interest in real property. But here the student should be apprised that the word *interest* is often made use of in the law to indicate a right in landed property, which does not attain to the importance of an estate at law; for instance, we speak of the right of the wife in the lands of her husband as her dower *interest*, not estate, although, should she become his widow, this interest ripens into what is known as her dower *estate*, and is so designated in the law.

<sup>1</sup> Robertson v. Van Cleave, 129 Ind. 217, 15 L. R. A. 68; 2 Blk. Com. 104.

<sup>2</sup> 2 Blk. Com. 105.

<sup>3</sup> Jackson v. Van Zandt, 12 Johns. 169; Lit., sec. 1.

§ 63. **Signification of the word "heirs."**—The use of the word "heirs" was formerly, and to some extent still is, a necessity in the creation of a fee-simple estate.<sup>1</sup> In all conveyances *inter vivos* its use is still adhered to, though in most jurisdictions it is now held that all limitations by deed will be taken most strongly against the grantor; and hence, if no words of qualification are made use of, all the estate which the grantor has in the property will pass to the grantee by such conveyance.<sup>2</sup> But if not now everywhere necessary, it is always a proper mode of expressing an intention to limit an estate in fee simple in all instruments of conveyance *inter vivos*. In the case of wills the intention of the testator, to be gleaned from a consideration of the entire instrument, will govern, thus rendering the use of the word "heirs" quite unnecessary therein.<sup>3</sup> It is but fair to say, however, that no good conveyancer would ever attempt to limit a fee-simple estate in any other manner than by the use of this word.

§ 64. **Estates in fee simple, how distinguished.**—An estate in fee simple is distinguished by the fact that it now possesses all of the attributes of absolute ownership, viz., unlimited duration in point of time, and unrestricted enjoyment coupled with the full and free power of disposition; and any estate which is lacking in any one of these incidents falls short of being an estate in fee simple. And this is the test that we may apply in all cases where the quality or quantity of an estate is in question. But some explanation of these three incidents may be necessary in order to enable us to make use of the test.

§ 65. **Its incidents explained.**—By unlimited duration in point of time, in this connection, is meant that an estate in fee simple being one of inheritance generally,<sup>4</sup> the time for which it is to continue is not circumscribed by birth or fail-

<sup>1</sup> 4 Kent Com., 6, note; Truesdell v. Lehman, 47 N. J. Eq. 218.

<sup>2</sup> 1 Washb. Real Prop., 52, note 3.

<sup>3</sup> See above citation, where the states so holding are enumerated.

<sup>4</sup> Will. R. P. (17th Int. ed.), p. 43.

ure of issue, by the termination of a life or lives or by the lapse of any stated period of time, and consequently, as a matter of law, it is in quantity of unlimited duration as to time, and therein differs from an estate in fee tail, a life estate and an estate for years, the first of which is dependent on the existence of issue, the second on the duration of a human life or lives, and the third upon the passing of the time for which it was created to endure.

§ 66. **Free enjoyment.**—A tenant in fee simple is said to have the right of free enjoyment of his estate. This indicates that he may do as he likes with the property thus held by him so long as he does not violate the law of the land nor infringe upon the rights of others in so doing.

The student will readily perceive that if one has an estate which is so limited that it must finally pass to some other already appointed person, as, for example, an estate for life, the tenant can make only such uses of his estate as will not impair the rights of him who is afterwards to receive the land in which such estate is granted. So in this case the enjoyment of the tenant is restricted; that is, the uses to which he may put the land in which he has such an estate are limited.

But in the case of an estate in fee simple there is no such other person to whom the estate must pass, and so the tenant is not restricted in regard to his use of it. He may open mines, clear woodlands, cultivate in the manner that suits him best, or not at all if he so desires; and these things being in his own right, he is said to have free enjoyment, which, it may be added in passing, is characteristic of no other estate at law.<sup>1</sup>

<sup>1</sup> It must be understood that we are here speaking of the *typical* estate in fee simple, when unburdened by covenants or agreements made between grantor and grantee. Certain restrictions may be embodied in conveyances with regard

to the uses to which the lands of tenants in fee simple may be put, as, for instance, easements, party-wall agreements, building restrictions, etc., of which we shall treat at length in a succeeding chapter.

**§ 67. Power of alienation.**—The third and most important incident of an estate in fee simple is the power of free disposition. This includes both the power of the tenant to alien his property without hindrance during his life-time and to leave it by will at his death to whomsoever he sees fit. As we proceed with the examination of the other estates at law, we shall find that this power of alienation exists to the same extent in no other estate. Indeed it is the law that if, in limiting an estate in fee simple, any condition which imposes a general restraint upon alienation is made, such condition will be void.<sup>1</sup>

**§ 68. How acquired.**—One may take an estate in fee simple either by descent or by purchase, and as a purchaser either by deed or by will. But when one takes by deed, a consideration is requisite to the validity thereof. And these considerations are of two kinds—good and valuable. A good consideration is sufficient to pass title as between the parties to the deed, but not as against strangers thereto. A valuable consideration is effectual for all purposes.

**§ 69. Special powers of tenants in fee.**—An estate in fee simple, as has been said above, is the entire and absolute interest in the land,<sup>2</sup> and consequently no one can have a greater estate. Nor when one has granted out a fee can he thereafter make any further disposition, because nothing remains in him for disposition. But estates in fee simple may be granted upon certain restrictions or conditions, and may also be rendered defeasible on the happening of some future event.

Again, a tenant in fee simple, having the absolute and entire interest and property in the land, may not only alien his entire estate, but may also grant thereout any of the lesser estates. He may limit an estate for years to one person, followed by an estate for life to another, for example, and still retain the fee to himself.

<sup>1</sup> Will. R. P. (17th Int. ed.), p. 94. But conditions in partial restraint of alienation, as, for instance, excluding certain persons as alienees, will be upheld. Ibid., p. 94.  
<sup>2</sup> Greenl. Cruise, p. 55.

§ 70. **Summary.**— To sum up: If a gift be made to A and his heirs, A takes a freehold estate of inheritance, the duration of which is unlimited, the enjoyment unrestricted and the power of alienation absolute. And when these incidents are all present, we have an example of a fee-simple estate. Hence a gift to a man and his heirs generally, creates a fee-simple estate.

## CHAPTER IV.

### ESTATES IN FEE TAIL.

- § 71. Nature of estates in fee tail.
- 72. Origin.
- 73. Development.
- 74. Early mode of alienation.
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- 91. Effect of fine and recovery.
- 92. Nature of a common recovery.
- 93. Effect of suffering a common recovery.
- 94. Tenant's own acts not affected thereby.
- 95. Fines and recoveries abolished in England.
- 96. Family settlements.
- 97. Estates tail in the United States.
- 98. The estate at common law and under statutes.

§ 71. Nature of estates in fee tail.—We are now to consider another of the freehold estates of inheritance, one which was formerly of great importance and in common use. We shall see that it differs from an estate in fee simple chiefly in that it is one of inheritance *especially*, and that the power of the tenant to alien, and his right of free enjoyment,

are both in a measure restricted. Some explanation of the origin and development of estates in fee tail, or estates tail as they are oftentimes called, will be necessary to enable us to ascertain their characteristics and understand their peculiarities.

§ 72. **Origin.**—The policy of the law has long been in England, as in this country, to allow free disposition of all kinds of property. As a result of this, estates in fee tail have now fallen much into disuse. The learning on the subject of such estates is, however, still of importance to the student of American law, if for no other reason than because we find frequent reference to it in the books, and though not generally existing in its original form in this country, yet, as modified by statutory enactments, it is still recognized. We find, for example, that it is provided in some states that language which formerly created an estate tail shall be held to create a fee simple, while in others that by such language a life estate only will be created.

§ 73. **Development.**—Reference has heretofore been made to the fact that all fees were not fees simple, and that they may be created upon certain conditions touching their inheritance, in which case they are known as conditional fees. A conditional fee at the common law was a fee restricted to some particular heirs to the exclusion of others. The form of such an estate was to one “and the heirs of his body.” The *condition* attached was that of the birth of issue as specified in the gift. If there were a failure of such issue, the estate, on the death of the tenant in tail, reverted to the person who created it; and before issue born, the tenant could not alien his estate. But upon issue being had, alienation was allowable. Still, even after issue it was not an absolute estate, for, if the tenant did not take advantage of his power to alien, the estate descended according to the form of the gift, *i. e.*, to the particular heirs specified in the gift; and if the issue died during the life-time of the tenant, the land, upon the death of the tenant, reverted to him who had created the tenant’s estate.



§ 74. **Early mode of alienation.**—Therefore it often happened that in order to free the land from the course of descent prescribed in the gift, the tenant, as soon as he had issue, would alien and afterwards repurchase the lands. This proceeding gave to him an estate inheritable by the heirs general, according to the common law.<sup>1</sup> In other words, it wiped out the condition and transformed the estate into a fee simple.

§ 75. **Efforts made to restrict alienation.**—Thus the original intention of such gifts was in a great measure defeated, and in the reign of Edward I. the barons began to perceive that the power of their own families was being lessened by successive alienations, and that there was little chance that lands granted by conditional gifts to their tenants and the heirs of their bodies should ever again come back to them, which was the end sought to be accomplished by attaching this condition to fees.

§ 76. **The statute de donis.**—To remedy this state of things and to perpetuate the feudal system, the barons procured the passage of the statute of Westminster the second, by which it was enacted that the will of the donor (grantor), according to the form in the deed of gift manifestly expressed, should be from thenceforth observed, so that they to whom the tenement was given should have no power to alien it, whereby it should fail to remain unto their own issue after their death, or to revert unto the donor or his heirs, if issue should fail. This statute is commonly called the Statute De Donis Conditionalibus.<sup>2</sup>

§ 77. **Derivation of the name.**—Since its passage, an estate given to a man and the heirs of his body has been called an estate tail, or more properly an estate in fee tail, because thereby the inheritance was cut down and confined to the heirs of the body strictly.

<sup>1</sup> See 2 Blk. Com. 110, 111; Paine's Case, 8 Rep. 36; Stafford v. Buckley, 2 Ves. Sr. 180.

<sup>2</sup> 13 Edw. I., ch. 1.

§ 78. **Definition.**—An estate in fee tail is an estate given to a man and the heirs of his body, and is a freehold estate of inheritance.<sup>1</sup> It is defined to be such an estate as will, if kept to itself, descend on the decease of the first taker to all his lawful issue according to the customs of descent, so long as his posterity endures, in a regular order from one to another, and which, if the first taker should die without issue, if left alone, will then determine.<sup>2</sup>

§ 79. **These estates are determinable in their nature.** It will be seen that an estate in fee tail is a determinable estate. The distinction must be remembered between determinable or qualified fees and fees simple. The word *fee* expresses the genus of estates of inheritance, and the epithets added to this term describe the several species of this estate. A determinable estate, like a simple estate, may endure forever. But while the term of the latter may not be abridged by any event expressed in any clause of condition or collateral determination, or by any implication of law, the former, according to the express terms of the limitation thereof when it is first taken, or the construction of law on the nature of the estate after it is created, may determine by some event before the period or term shall be completed through which it is extended.<sup>3</sup>

§ 80. **Effect of statute de donis.**—The statute *de donis* gave to an old estate new and different characteristics.<sup>4</sup> It was considered as a remedial law, and was interpreted with great latitude, as embracing all cases which, from the manifest intention of the parties, require the application of the provisions of the statute. The intention of the parties was to be collected from the words of the gift in the clause of limitation, and construction was to be made on the whole gift collectively.

<sup>1</sup> Bodine v. Arthur, 34 Am. St. R. 162.

<sup>2</sup> Will. R. P.

<sup>3</sup> See First Univ. Soc. v. Boland, 15 L. R. A. 231.

<sup>4</sup> Rowland v. Warren, 10 Oreg. 129; Pierson v. Lane, 60 Iowa, 60.

§ 81. **Classification and division.**—Estates in fee tail are usually divided into fee-tail general and fee-tail special. The former is where the estate descends to the heirs of the body generally and without restriction, and the latter when it is restrained to certain heirs of the body and does not go to all of them in general. An example of estates tail special is where an estate is given to a man and the heirs of his body by a particular wife, in which case those only can inherit who are his issue by the wife specified.

§ 82. **Further division.**—A further division is into tail male and tail female. The former admits only the male sex to the succession and excludes the female, while the latter excludes the male and admits only the female. A gift to the heirs male of the body does not confer any right on the issue female, and, on the other hand, a gift to the heirs female of the body will remove the heirs male out of the line of succession. In the former case the succession is conducted exactly as if there were not any females, and in the latter case exactly as if there were no males.<sup>1</sup> The person who claims, to entitle himself as an heir male under a gift to the heirs male of the body, must through every degree convey his descent by males without the intervention of females; and, in like manner, the person who claims to entitle herself as an heir female, under a gift to the heirs female of the body, must through every degree convey her descent by females without the intervention of males.

§ 83. **Effect of improbability of issue.**—As pertinent to all gifts in tail, it may be observed that though, in all human probability, the donee will not have any issue, or may not have any issue of that particular description which the limitation requires, yet if there be a mere possibility that there may be such issue, the law, to give effect to the words of limitation, and to preserve the estate in point of continuance and quality, will presume that there may be issue of that description. Thus, a gift will be good though it may be made

<sup>1</sup>Price v. Taylor, 28 Pa. St. 95, 70 Am. Dec. 105.

to an unmarried man and the heirs of his body, or though it be made to a man or a woman of the age of one hundred years, and to the heirs of his or her body thereafter to be born, or to such man and woman and such heirs of their bodies.

§ 84. **Signification of "gift," "donor," "donee," etc.** By whatever mode of assurance an entail is created, the limitation which creates the estate is denominated a gift. The creator of the entail is termed the donor, and the object of the entail the donee. Any assurance which will convey a fee simple will, with the requisite words of restraint or qualification, convey an estate tail. As in the creation of a fee-simple estate, so in order to the creation of an estate tail by deed, it is required that the gift shall either by express words, or by words of direct and immediate reference, be to the "donee and the heirs of his body."<sup>1</sup>

§ 85. **Necessity of words of procreation.**—In addition to the circumstance that the gift must be extended to the heirs specially, the words of the gift must, in direct terms or by reference, contain words of procreation to describe the body from which these heirs are to proceed, or the person by whom they are to be begotten.<sup>2</sup>

§ 86. **Form of words necessary to create this estate.**—Words of reference in limitations of estates tail operate in the same manner as words of reference in limitations of estates in fee. No set form of words is necessary to the gift; it may be expressed in different terms and be effectual. But the rule is in all gifts that the heirs must either by express words or suitable words of reference be limited to be procreated or begotten by or on some body or bodies in certain. The precise words "of the body" are not necessary.<sup>3</sup> It is sufficient that the words of the clause of limitation, or some part of the deed which refers to this clause and explains it,

<sup>1</sup> White v. Collins, Com. R. 289.

<sup>2</sup> Doty v. Teller, 54 N. J. L. 163,  
33 Am. St. R. 670.

<sup>3</sup> 7 Rep. 41. "The words "bodily

heirs" are equivalent to "heirs of the body." Clarkson v. Clarkson, 125 Mo. 381. See also Doty v. Teller,

*supra*.

or a reference by this clause to some other part of the same deed, or even to a separate instrument, should confine the gift to the heirs of the body of the donee or donees, or of some person or persons in particular.<sup>1</sup>

§ 87. **Construction when the estate is created by will.** In *wills* that strictness of the law which, in regard to deeds, requires that the limitation shall be to the heirs by that word except in cases already noted, and that these heirs shall be designated by words of procreation, descriptive of the body from which the heirs are to issue, or the person by whom they are to be begotten, is relaxed.<sup>2</sup>

§ 88. **The result of this rule as to wills.**—Though in construing wills the words which in a deed would create an estate tail will give a like estate, the reverse is not true; for words which in a deed pass an estate in fee, and again words which in a deed give only a life estate, may in a will pass an estate tail.<sup>3</sup>

§ 89. **Effect of failure of heirs.**—As soon as there is a failure of those heirs which the gift describes, the estate will determine unless it be extended by the operation of a common recovery or by discontinuance. A failure of heirs universally happens as soon as there is a defect in the line of those heirs in whose favor the entail is created. The issue in tail succeed under the character of issue under the entail, and not under the description of heirs. They take by descent and not by purchase.<sup>4</sup> And they do not take successive estates, but all the heirs under an entail take one and the same estate.

§ 90. **Incidents of the creation of this estate.**—Ordinarily an estate tail is created by a conveyance or devise in fee to some particular person, with a limitation over in the event of the death of the person named, without issue, or

<sup>1</sup> See Lord Raym. 1153; Gilmore v. Harris, 3 Lev. 213.

<sup>2</sup> Adams v. Ross, 30 N. J. L. 505, 82 Am. Dec. 237; Fahoney v. Hol-singer, 65 Pa. St. 388.

<sup>3</sup> Roe v. Quarterly, 1 T. R. 630; Richards v. Bergavenny, 2 Vt. 324.

<sup>4</sup> Sullivan v. McLaughlin, 11 S. R. 447.

upon an indefinite failure of issue. If it appears from the deed that the limitation over was not postponed until an indefinite failure of issue, but on failure of children only, or on failure of issue within a given time, the estate first created is not an estate tail.<sup>1</sup>

§ 91. **Effect of fines and recoveries.**—The invention of common recoveries and the statutes making fines with proclamations a bar to the issue, put the *issue* completely in the power of their ancestor. A *fine* is the proper assurance by tenant in tail when he himself has created the entail and has also the remainder or reversion in fee immediately expectant on the estate tail, and there are not any charges or incumbrances imposed on the remainder or reversion in fee which do not equally effect the estate tail. A fine must be considered either as creating a discontinuance or operating merely as a conveyance. In the first instance it carries out a new title in fee simple, without conveying the title under the old fee simple. In the other instance, a fee determinable on the failure of the issue inheritable under the entail is conveyed.

§ 92. **Nature of a common recovery.**—A common recovery was a judicial proceeding collusively taken against the tenant in tail for the recovery of the lands entailed, and was first allowed in *Taltarum's Case*.<sup>2</sup> Upon the action being brought, the tenant brought into court some third person, usually the crier of the court, presumed to have been the original grantor of the estate, whom he alleged had warranted the title. This person admitted the alleged warranty, and judgment was accordingly entered in favor of the tenant empowering him to recover other lands of equal value. The estate tail was thus said to be barred, and the issue had a judgment against the fictitious warrantor, who had no lands to give them in lieu of those the title to which the fictitious warrantor had failed in defending.<sup>3</sup>

<sup>1</sup> Outland v. Bowen, 115 Ind. 150,  
7 Am. St. R. 420; Hill v. Hill, 74  
Pa. St. 173, 15 Am. R. 545.

<sup>2</sup> Year Book 12 Edw. IV., 19.

<sup>3</sup> See 2 Blk. Com. 117, 358, and  
Will. R. P. 45, 46.

The student will, as a matter of course, understand that this proceeding amounted to and in effect was, only another of the various methods resorted to in earlier times to foster and promote the power of free alienation.

**§ 93. Effect of tenant suffering a common recovery.—**

A common recovery by tenant in tail, if duly suffered, has the effect of barring his estate tail, and all remainders over, or reversions depending upon the estate, and all limitations, conditions or restrictions annexed to the estate. The right of aliening by common recovery is an inseparable incident of an estate tail, and cannot be taken from the tenant by any condition or limitation.<sup>1</sup> The estate, though determinable by express limitation or by construction of law, will, by common recovery, become an estate in fee simple, if the person by whom the estate was created was tenant of an estate of such quality and quantity.<sup>2</sup> If such person had only a determinable or qualified fee, the estate taken under the recovery will not be more ample than the estate of the person who created the entail.<sup>3</sup>

**§ 94. Tenant's own acts not affected thereby.—** But by suffering a common recovery the tenant in tail cannot derogate from his own acts, or discharge the fee acquired under the recovery from the incumbrances which affected the estate tail. After the recovery the time or ownership of the estate tail continues, and the operation of the recovery is to take from that estate the privileges and qualities annexed to the same by the statute *de donis* in favor of the issue, and also those of the reversioner and remainderman.

**§ 95. Fines and recoveries abolished in England.—** But since the year 1833, when fines and recoveries were abolished in England by statute, a tenant in tail may, by an ordinary deed of conveyance enrolled in the court of chancery, alien in fee simple absolute or for any less estate, and a similar

<sup>1</sup> Dewitt v. Eldred, 4 W. & S. 421; Portington's Case, 10 Rep. 36.

<sup>3</sup> For an instance of common recovery in this country, see Lyle v. Richards, 7 S. & R. 322.

<sup>2</sup> Martin v. Strachan, 5 T. R. 109; Benson v. Hodson, 1 Mod. 105.

proceeding is sufficient in this country where common recoveries were allowable.<sup>1</sup>

§ 96. **Family settlements.**—Out of estates in tail grew what are known as family settlements, by which, subject to the wife's jointure, and, perhaps, some other charges, the eldest son who may be born of a marriage, and, in case of his decease without issue, the second son, and so on, is made tenant in tail, and the estate is thus tied up until some tenant in tail attains his majority, when he may, with the consent of his father, who is made tenant for life under the settlement, bar the entail.<sup>2</sup>

§ 97. **Estates tail in the United States.**—In the early history of this country estates tail were not uncommon, but they are not generally looked upon with favor at the present day. In many of the states they have been abolished and their creation forbidden by statute.<sup>3</sup> Under these conditions it is usually held that a grant in words that formerly would have created an estate tail now create a fee simple.<sup>4</sup> But in a part of these states,<sup>5</sup> a remainder, or what would have been an estate tail, takes effect on the death of the first taker, without issue, as a contingent limitation upon a fee. In other states<sup>6</sup> an estate tail is converted into a life estate in the first donee, with remainder in fee simple to the person to whom the estate would have passed at common law on the death of such donee. In a few states<sup>7</sup> the re-

<sup>1</sup>The estate may be barred by deed in Massachusetts, Maine, Rhode Island, Delaware, Pennsylvania, Maryland and Oregon. See *Rowland v. Hill*, 10 Oreg. 129.

<sup>2</sup>Will. R. P., p. 50; 2 Cooley's Blk. Com. 118, note.

<sup>3</sup>So in Alabama, California, Dakota, Florida, Georgia, Kentucky, Indiana, Michigan, Minnesota, Mississippi, New York, North Carolina, Pennsylvania, West Virginia, Virginia, Wisconsin and Tennessee.

<sup>4</sup>*Price v. Taylor*, 28 Pa. St. 95; 70 Am. Dec. 105; *Allen v. Craft*, 109 Ind. 476; *Jordan v. Roach*, 32 Miss. 619; *Short v. Terry* (Ky.), 22 S. W. R. 841.

<sup>5</sup>California, Dakota, Indiana, Michigan and New York.

<sup>6</sup>Arkansas, Colorado, Illinois, Missouri and Vermont.

<sup>7</sup>Connecticut, New Jersey and Ohio.



mainder goes to the children of the first donee as tenants in common, the children of a deceased child taking their parent's interest.<sup>1</sup>

§ 98. **The estate at common law and under statutes.**— In some states, where the statutes are silent on the subject, estates tail may be allowable under the rule that the common law of England is in force in this country so far as it is not abrogated by statutory provision. But the power to create such estates under such circumstances and in such jurisdictions has been oftentimes questioned and frequently denied.<sup>2</sup> The law with regard to the creation of estates tail being so widely variant in the different states, it is suggested to the student that every such gift or grant as those under discussion should be considered in connection with the rule of law obtaining in the jurisdiction where the object or objects of such gift or grant are situated, and the force and effect thereof ascertained according to the provisions of such rule.

<sup>1</sup> Stinson's Am. Stat. Law, sec. 1313; *John v. Dann*, 66 Conn. 411. For a general discussion of the law on this subject in America, see

<sup>2</sup> *Pierson v. Lane*, 60 Iowa, 60; *Outland v. Bowen*, 7 Am. St. R. 420; *Jewell v. Warner*, 35 N. H. 176. and note.

## CHAPTER V.

### ESTATES FOR LIFE.

- § 99. Definition and explanation.
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- 101. The two divisions of life estates.
- 102. Necessity of restrictive words in the limitation.
- 103. Conventional and legal life estates.
- 104. The right of enjoyment restricted.
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- 126. Duty of tenant as to taxes.
- 127. Termination of estate — Merger, etc.
- 128. Termination of estate — Death, etc.
- 129. Termination of estates for life other than conventional.

§ 99. Definition and explanation.— We now come to a consideration of those freehold estates which are not of inheritance. The estate for life in its several forms is the only freehold estate of this quantity. An estate for life is

a freehold estate the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event.<sup>1</sup> But the uncertainty of this event has reference chiefly to the fact that the time at which such event may happen is not to be measured in periods of days, months or years. And herein this estate is to be distinguished from the estate for years, the duration of which is always so to be determined.

Like freehold estates of inheritance, estates for life are of feudal origin. They are in fact the most ancient of estates. It was also the smallest or least in quality of the freehold estates, a less estate not being considered worthy the acceptance of a free man.

§ 100. Estates for one's own life originally.—In the earlier period of the law, the only life estate considered of sufficient importance to be an estate of freehold was an estate for a man's own life, an estate for the life of another being not reckoned of equal rank.<sup>2</sup> This distinction, however, was not long observed, and so it came about that, if a man took an estate from one who held it for his own life, or if an estate were originally limited to one person so long as another should live, the new owner, or the grantee in the second instance, took an estate for the life of another. This was called an estate *pur autre vie*, and the person for whose life the estate was held was called the *cestui que vie*. And now he who has an estate for the life of another has an estate of freehold. Generally speaking, such estates will endure as long as the life for which they are granted. But there are some estates which are considered life estates, and which are estates of freehold, because they *may by possibility* last for a life, though the time for which they will endure is uncertain. Such, for instance, is an estate granted to a woman during her widowhood, which is in law a life estate, though determinable on her marrying again.<sup>3</sup>

<sup>1</sup> Greenl. Cruise, Dig., p. 102.

<sup>3</sup> Will. R. P. 22; 2 Blk. Com. 121.

<sup>2</sup> Will. R. P. 22.

§ 101. **The two divisions of life estates.**—Estates for life are of two kinds: *conventional*, or such as are expressly created by the act of the parties, and *legal*, or such as are created by construction and operation of law.<sup>1</sup> Estates of either sort may be created by deed or by will. In the conventional estates the words generally made use of in limiting the estate are: for and during a natural life or lives. The word “natural” was originally made use of to continue the estate in the event that the person upon whose life the estate was limited should suffer outlawry or *civil* death, which was the penalty prescribed for the commission of certain felonies in the English law. While we have nothing similar to this in the United States, yet the words “natural life” are still made use of.

§ 102. **Necessity of restrictive words in the limitation.** Since the establishment of the rule that grants shall be taken most strongly against the grantor, it has been necessary, at least in deeds, to add apt words for that purpose when only a life estate is intended to be given, for otherwise the entire interest of the grantor would pass. As a matter of course, when occurring in a will the usual rules of construction as applied to such instruments will govern, and the intention of the testator will be followed. At the early law a grant to a man simply conferred no more than an estate for his life,<sup>2</sup> the use of the word “heirs” being deemed essential to pass an estate of inheritance; but as we have already seen, such is not now the law. In the matter of creating this estate by devise, it is not necessary to make use of any particular form of words, it being sufficient in such cases if it appear by necessary implication that such an estate was intended to be given.<sup>3</sup>

§ 103. **Conventional and legal life estates — Enjoyment.** Thus far we have had reference only to the conventional estates for life, for to such estates alone are the rules for crea-

<sup>1</sup> 2 Blk. Com. 119.

<sup>3</sup> Lehndorf v. Cope, 123 Ill. 317.

<sup>2</sup> Truesdell v. Lehman, 47 N. J. See also Defreese v. Lake, 32 L. R. Eq. 218. A. 744.

tion which we have just discussed to be applied. But in considering the matter of the *enjoyment* by the tenant of his estate for life, as we shall now proceed to do, we shall make frequent reference to *legal* as well as *conventional* life estates; for when one has come into possession of an estate for life, his right of enjoyment thereof, except it be restricted in the grant, will be identical whether such estate be conventional or legal.

§ 104. **The right of enjoyment restricted.**—Not only does the estate for life differ from the other estates of freehold in that it is not of inheritance, but the rights of tenant of such estate fall far short of those in fee simple or fee tail in the important matter of enjoyment. It is quite apparent that some other person or persons always have an interest in the lands of which tenant for life is in possession. Such interest is always a future one, and in a certain sense contingent, but yet of such a nature that the law protects those having it therein. Tenant for life virtually has only the *use* of the lands during the continuance of his estate.

§ 105. **Nature of this enjoyment and possession.**—Such tenant is therefore bound to make only such use of the lands as will not in any way or manner prejudice the rights of those having an ultimate interest therein. The books are replete with cases where the tenant's rights and manner of enjoyment have been called in question and passed upon by the courts. From a great multitude of decisions on these points there has been developed a series of rules and principles which taken together form what is known in the law as the doctrine of waste.

§ 106. **The doctrine of waste.**—This doctrine does not attempt to set forth what the tenant *may* do, but rather to place restrictions on his right of enjoyment and thus to outline his privileges in that regard. Waste is defined to be spoil or destruction in houses or lands by the wrongful act or by the permission or negligence of tenant for life. Such acts or negligence must result in impairing the value of the inheritance to constitute waste. Where the injury is by the

direct act of the tenant it is called voluntary waste; where by his mere negligence, permissive waste.<sup>1</sup>

**§ 107. Waste — Voluntary and permissive.**— Voluntary waste consists in some positive wrongful act which injures the inheritance. Permissive waste is the neglect of some duty from which a like injury follows.<sup>2</sup> In many instances merely to change the nature and use of land, as to convert arable land into pasture, is to impair its value by changing the course of husbandry, and such an act is waste.<sup>3</sup> But where destruction of, or injury to, the premises of such a character as to be waste, if done through or by the tenant, is caused by the act of the grantor himself or of the public enemy or by the act of God, the tenant is not liable.<sup>4</sup>

**§ 108. What acts constitute waste.**— It is quite impossible to state what certain acts will or will not constitute waste, for what would be waste in an old and well-settled country would not necessarily be so in a new one. To fell trees would be waste in a sparsely-wooded country, but to do so in one where there was a surplusage of woodland might be perfectly proper and in accord with the usual course of husbandry. What constitutes waste in a particular case must depend on the situation and requirements of the land, the customs in force in that portion of the country, and the other circumstances of the case.<sup>5</sup>

**§ 109. A question of fact.**— Therefore it may be fairly said in conclusion, that whether or not a particular act constitutes waste is generally a question of fact to be decided by the jury under proper instructions from the court.<sup>6</sup> It should be remarked in passing that estates for life are sometimes created in such a manner that the tenant is absolved

<sup>1</sup> *Smith v. Sharp* Busbee's Law, 91; s. c., 57 Am. Dec. 574; *Wilds v. Layton*, 12 Am. Dec. 91.

<sup>2</sup> *Cooley's Elem. Torts*, p. 123.

<sup>3</sup> *Pyncheon v. Stewart*, 45 Am. Dec. 207.

<sup>4</sup> *White v. Wagner*, 4 H. & J. 373; s. c., 7 Am. Dec. 674.

<sup>5</sup> *Webster v. Webster*, 33 N. H. 25; *Lynn's Appeal*, 31 Pa. St. 44.

<sup>6</sup> *Ward v. Sheppard*, 2 Am. Dec. 625.

from liability for waste, and in such cases he is said to take the estate “free from impeachment of waste.”

§ 110. **Trespass and waste distinguished.**—It is frequently a matter of some difficulty to determine whether an act be a mere trespass or of such a nature as to constitute waste. In distinguishing the one from the other it should be remembered that, while trespass is an injury to the *possession itself*, waste is committed or suffered by the person actually or constructively in possession of the land.<sup>1</sup>

“In general, waste is the abuse or destructive use of property by him who has not an absolute or unqualified interest therein, and trespass is an injury or use, without authority, of the property of another by one who has no right whatever.”<sup>2</sup>

§ 111. **Effect on estate of commission of waste.**—The commission of acts amounting to waste by the tenant does not result in the loss to him of his estate. The law has provided two remedies to which the person entitled to the inheritance may resort. The first of these is that of *injunction* to restrain the tenant from committing waste,<sup>3</sup> and injunctions are frequently granted to preserve the estate pending litigation involving the title.<sup>4</sup> The second remedy is an action on the case, wherein the tenant may be compelled to respond in damages for an act of waste already committed.<sup>5</sup>

§ 112. **Right of the tenant to emblements.**—Before taking leave of the subject of the tenant's rights of enjoyment in an estate for life, there are certain other incidents of such an estate which should receive our consideration. Since the termination of such an estate is, as to the time thereof, contingent and uncertain, it would be manifestly unjust that the tenant should be prejudiced by any sudden termination of his estate. It is therefore provided that upon a

<sup>1</sup> Cooley's Elem. Torts, p. 123.

<sup>4</sup> Gause v. Perkins, 56 N. C. 177;

<sup>2</sup> Bland, Chancellor, in Dwall v. s. c., 69 Am. Dec. 728.

Waters, 1 Bland's Ch. 569.

<sup>5</sup> Cooley on Torts (2d ed.), 395.

<sup>3</sup> Cooley on Torts (2d ed.), 395;

Hawley v. Clawes, 2 Johns. Ch. 123.

sudden or unexpected termination of his tenancy, as, for instance, by the death of the tenant, where he holds for his own life, between the time of the sowing and the harvesting of crops, his representatives shall have the profits of the crop, known in the law as the emblements, in compensation for the expense of tilling, manuring and sowing the lands. If, however, the tenancy be determined by the tenant's own act, he is not entitled to take the emblements. To entitle him to emblements his estate must be of uncertain duration, and must be terminated in some other manner than by his own act.<sup>1</sup>

§ 113. **Tenant's right to estovers.**—Again, every tenant for life, unless restrained by covenant or agreement, may take from the land what are known as estovers, or botes, reasonably necessary for his immediate use. This was given him for the benefit and encouragement of husbandry. The common law allowed house-bote — a sufficient allowance of wood to repair *the buildings* or to burn in his house; *plough-bote* and *cart-bote* — wood to be employed in making and repairing all instruments of husbandry; and *hay-bote* or *hedge-bote* — wood for repairing hedges and fences upon the lands.<sup>2</sup> The estate and beneficial interest of the tenant for life extends to the use of the lands and no further. So his right to the wood and timber cannot extend to any use thereof except upon the premises; for instance, he cannot sell wood to pay for cutting what he needs for fuel.<sup>3</sup> It is to the advantage of him who has the inheritance that the improvements on the lands should not fall into decay, but the extent to which tenants may go in this regard without being guilty of waste is not a matter for absolute rule, but must depend on circumstances, and often largely upon the customs of that part of the country in which the land is situated.<sup>4</sup>

<sup>1</sup> See 2 Cooley's Blk., p. 123 and note; Reiff v. Reiff, 64 Pa. St. 134. <sup>3</sup> White v. Cutler, 17 Pick. 248; Phillips v. Allen, 7 Allen, 115.

<sup>2</sup> 2 Blk. Comm. 122; Miles v. Miles, 32 N. H. 147; s. c., 64 Am. Dec. 367, and notes. <sup>4</sup> Simmons v. Norton, 7 Bing. 640.



**§ 114. Tenant's power of alienation.**— Having examined somewhat into the rights of enjoyment possessed by a tenant of an estate for life, we now proceed to investigate his power of alienation. And herein we shall note another matter wherein this estate of freehold falls short of those we have heretofore had under consideration.

**§ 115. No absolute power of alienation at the early law.** Originally the holder of a life estate could not alienate it without the consent of his lord. A grant of lands to a man was a grant to him only so long as he could hold them in person, that is, during his life and no longer, for feudal donations were to be taken strictly, and could not by any presumed intent be extended beyond the precise terms of the gift. Unless the gift was to the tenant and his heirs, or limited in other words expressive of an intention that the descendants of the tenant should succeed him in the tenancy, the lands reverted to the grantor on the death of the tenant. If the heirs were thus nominated in the original grant, "the ancestor and the heirs took equally as a succession of usufructuaries, each of whom during his life enjoyed the beneficial, but none of whom possessed or could lawfully dispose of the direct and absolute dominion of the property."<sup>1</sup>

**§ 116. Development of power of alienation.**— So at the common law it was implied in every estate for life that the tenant would not alienate. Sometimes the instrument creating the estate contained a clause expressly prohibiting the tenant from aliening. In more recent times it has been held, with regard to such a restraint, that it operates as a condition subsequent only, and that in case of a violation of the condition the estate will be defeated only at the election of him who has the right to enforce it.<sup>2</sup>

**§ 117. Continued.**— But, as we have seen, restraints were gradually removed from alienation, so that now, in the absence of an express condition prohibiting alienation, the ten-

<sup>1</sup> Co. Litt. 191a, n. (1), VI, 5; Burgess v. Wheate, 1 W. Blk. 133.

<sup>2</sup> Haywood v. Kinney, 84 Mich. 591.

ant may part with his estate or any portion thereof.<sup>1</sup> But, of course, he can make no leases to endure beyond his own life, unless he be specially empowered so to do by the gift under which he holds.<sup>2</sup>

**§ 118. Effect of attempted alienation at common law.—**

At common law, if tenant for life attempted to convey a fee or any other estate greater than that which he had, he thereby worked a forfeiture of his own estate. By granting out a larger interest than his own, he put an end to his original interest, and the next taker was entitled to enter as in his reversion or remainder. The reason for this was that this attempted alienation amounted to a renunciation of the feudal connection and a refusal to render the services due to the lord.<sup>3</sup> But the result of forfeiture did not follow a conveyance made in any other mode than by feoffment; and inasmuch as feoffment is unknown in this country, nothing done or suffered by tenant for life can operate as a forfeiture of the estate to tenant in remainder.

**§ 119. The modern rule in this regard.—**A deed by the life tenant purporting to convey a greater interest than he has does not work a forfeiture, but passes to the grantee the estate which the tenant could lawfully convey. This is so provided by statute in some states, and is probably the law in those states where the statutes are silent upon the subject.<sup>4</sup>

**§ 120. Apportionment.—**Formerly, if tenant for life had leased the lands to an under-tenant, reserving rent to be payable at certain periods, and died, the rent, if paid at all, would fall to the reversioner, or the lessee might abandon the premises and pay rent to no one.<sup>5</sup> The representatives of the deceased life tenant could collect no portion of the rent due since the last rent day. But now in many of the states of the Union it is provided that on the death of tenant for life, and in some states the statutes apply to any case

<sup>1</sup> *Criswell v. Grumbling*, 107 Pa. St. 408.

<sup>2</sup> *Will. R.* P. 25.

<sup>3</sup> 2 *Blk. Comm.* 274.

<sup>4</sup> 2 *Cooley's Blk.* 274, note; *Pope v. Pickett*, 65 Ala. 487; *Fields v. Bush*, 94 Ga. 664.

<sup>5</sup> 10 *Rep.* 127.

where the estate is terminated, no matter by what contingency, his personal representatives may recover from the lessee the proportion due at the time of death.<sup>1</sup>

§ 121. **The possession never adverse, etc.**—The possession of the tenant for life can never by any possibility become adverse to the remainderman or reversioner, since such possession is no interference with the rights of the latter. This is true, even though the tenant denies the existence of an estate in reversion or remainder, and openly claims to be the absolute owner, “for the person in reversion or remainder concedes the right of possession for life and therefore cannot dispute it.”<sup>2</sup> And though the life tenant may lose his right by a possession adverse to him for the statutory period, such possession cannot operate against the remainderman or reversioner. The rights acquired by it terminate with the termination of the life estate. Though the tenant sell the property as if he had the fee, and his grantee enters into possession under the supposition that he has acquired a fee, his possession under such claim is not adverse to the remainderman or reversioner until the latter acquires the right of possession by the termination of the life estate.<sup>3</sup>

§ 122. **Presumption of conveyance by remainderman.** Attempts have been made to have applied to such cases the rule that, from long possession, a presumption is to be indulged that the reversioner or remainderman conveyed to the tenant in possession. “The doctrine of presumption as well as the statutes of limitation is founded upon the principle of laches in him who, having the right, power and capacity to seal and to disturb or recover possession, for a long time omits and neglects to do so; and to presume against him who is unable to sue, whose right of action has not ac-

<sup>1</sup>So in Arkansas, Delaware, Indiana, Iowa, Kentucky, Massachusetts, Mississippi, Missouri, New York, New Jersey, Pennsylvania, South Carolina, Tennessee, Virginia, West Virginia and Wisconsin.

<sup>2</sup>Salmons v. Davis, 29 Mo. 176.

<sup>3</sup>Stevens v. Winship, 1 Pick. 317, 11 Am. Dec. 178.

crued, who has been guilty of no laches, that his title has passed from him or from those under whom he claims, would be both novel and mischievous.”<sup>1</sup>

**§ 123. Duty of tenant as to repairs.**—Before passing to the consideration of legal life estates in particular, it may be well to discuss in a brief manner one or two other matters which are equally characteristic of both sorts of estates for life. And first, it is the general rule that when it is necessary to improve the estate, or to make alterations, or to be at expense to make the property productive, the tenant for life must make such improvements and alterations at his own cost. Such charges, or any part thereof, cannot be put upon the reversioner or remainderman.<sup>2</sup>

**§ 124. Duty of tenant as to insurance.**—In the absence of anything in the instrument creating the estate that requires it, or of any agreement to that effect on the part of the life tenant, he is not bound to keep the premises insured for the benefit of the remainderman. In the absence of any agreement, neither has any claim upon the proceeds of the policy of the other. Nor is the tenant bound to use the proceeds of his policy in rebuilding.<sup>3</sup>

**§ 125. Duty of tenant with regard to mortgage, interest, etc.**—If, by a deed, a life estate is conveyed to one and a fee to another, and, as part of the same transaction, the life estate is mortgaged by the grantee to the grantor, the mortgage would attach to the life estate, and the fee would pass unaffected by the mortgage.<sup>4</sup> But tenant for life is not required to pay off the principal of a mortgage for the benefit of the estate of the reversioner. The life tenant is bound to pay the interest on incumbrances during the continuance of his estate.<sup>5</sup>

<sup>1</sup> *Ortwein v. Thomas*, 127 Ill. 554, 11 Am. St. R. 159; *Lamar v. Peane*, 82 Ga. 354, 14 Am. St. R. 168; *McCarry v. King's Heirs*, 3 Humph. 267, 39 Am. Dec. 173.

<sup>2</sup> See opinion in 46 Am. Dec. 56; *Caldecott v. Brown*, 2 Harc. 144.

<sup>3</sup> *Harrison v. Pepper* (Mass.), 44 N. E. R. 232.

<sup>4</sup> *Lehndorf v. Cope*, 122 Ill. 317; *Thomas v. Thomas*, 17 N. J. Eq. 356.

<sup>5</sup> See cases on this point in 25 Am. Dec. 721, 42 Md. 251, 67 N. W. R. 338.

§ 126. **Duty of tenant to pay taxes.**— In the absence of any provision to the contrary, it is the duty of tenant for life to pay the taxes assessed on the land during his tenancy.<sup>1</sup> Since he enjoys the property free from the payment of rent, it is as much his duty to pay the current taxes as it is to make the necessary improvements from time to time, since both of these are burdens incident to the present use and enjoyment of his estate. The liability of the tenant in this regard, however, does not extend beyond the rental value of the premises.<sup>2</sup> But tenant for life cannot acquire a tax title to the defeat of the reversioner or remainderman.<sup>3</sup> But for any advances made by him for the benefit of the reversioner or remainderman, where he is not bound, he becomes a creditor of the estate of such reversioner or remainderman.<sup>4</sup>

§ 127. **Termination of estate, merger, etc.**— It is a rule of law that whenever a greater and a less estate coincide and meet in one and the same person, without any intermediate estate, the lesser estate is immediately annihilated, or, in the law phrase, it is said to be merged, that is, sunk or drowned in the greater.<sup>5</sup> Thus, if the tenant for life acquire the reversion, the life estate is merged in the greater estate, and so if the life estate is conveyed to one having the reversion.<sup>6</sup> This doctrine has its foundation in the convenience of the parties in interest.<sup>7</sup>

§ 128. **Death.**— Estates for life will of course terminate with the ending of the life for which they are granted. In case of an estate *pur autre vie*, the estate will terminate not on the death of the tenant, but on the death of the *cestui qui vie*. Formerly on the death of the tenant during the life of the *cestui qui vie* the land did not revert to the

<sup>1</sup> Lacy v. Davis, 4 Mich. 140; s. c., 66 Am. Dec. 524; Waldo v. Cummings, 45 Ill. 421.

<sup>2</sup> Munch v. Smith Mfg. Co., 47 N. J. Eq. 193.

<sup>3</sup> Stewart v. Matheny, 66 Miss. 21; s. c., 14 Am. St. R. 538.

<sup>4</sup> Whitney v. Salter, 36 Minn. 103; Estabrook v. Royan, 52 Ohio St. 318.

<sup>5</sup> 2 Blk. Com. 177.

<sup>6</sup> Will. R. P. 281.

<sup>7</sup> Moore v. Luce, 29 Pa. St. 260.

grantor, for he had conveyed away all his interest until the death of the *cestui qui vie*, but went to the one who should first enter on the land, and he might retain the possession by right of occupancy so long as the *cestui qui vie* lived.<sup>1</sup> Statutory provisions have now generally taken the place of this peculiar rule of the common law.<sup>2</sup>

§ 129. **Termination of estates for life other than conventional.**—The matter of the termination of estates for life other than conventional is dependent largely upon the conditions upon which the particular estate depends for its existence, and will be treated of more at length under the heading of Estates for Life Other than Conventional, which will form the subject of our succeeding chapter.

<sup>1</sup> 2 Blk. Com. 258.

<sup>2</sup> Will. R. P. 21, 22.

## CHAPTER VI.

### ESTATES FOR LIFE OTHER THAN CONVENTIONAL.

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132. Estates by the courtesy.
133. Incidents of estates by courtesy.
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165. How dower may be barred.
166. Effect of divorce.

§ 167. Statutory provisions.

168. Marriage settlements, jointures, etc.

169. Homestead estates.

170. This estate generally for benefit of head of family.

§ 130. **Legal life estates.**— We now come to the consideration of those estates for life which are created and exist by operation of law rather than by act of the parties. These are generally designated as Legal Life Estates. Among the most important of such estates are those arising out of the marriage relation, to wit: the interest of the husband in the lands of the wife, and the interest of the wife in the lands of the husband.

§ 131. **Estates arising out of the marriage relation.**— At the common law the husband and wife by the act of marriage became one person. The wife's legal existence was thereby suspended and so continued during coverture. So that where a wife at the time of her marriage was seised in fee of lands, her husband acquired a freehold therein. This estate was known as one *jure uxoris* (by the right of the wife), and was for the life of the husband. And during the life of the wife the husband received and might dispose of the rents, issues and profits of the lands without the consent of the wife.<sup>1</sup>

§ 132. **Estates by the courtesy.**— This estate of the husband came to be known as an estate by the courtesy of England, or an estate *by the courtesy*, and was so called because it had existence in England only. It is important to students of American law for the reason that the principles upon which it is based are recognized generally throughout the United States, and indeed the estate in form now exists in many of the states, and in the others some similar provision is made by statute whereby the husband is given an interest in the lands of the wife. An examination into the attributes and characteristics of this estate will therefore be of advantage to us in our present work.

<sup>1</sup> See 1 Blk. Com. 442; Will. R. P. 223.



**§ 133. Incidents of estates by courtesy.**—There are certain conditions which must be complied with or the law will not raise this estate in the husband. And first, the estate of the wife must be an estate in possession, for there can be no courtesy of an estate in reversion expectant on a life interest or other estate of freehold, the particular estate not being ended during coverture.<sup>1</sup>

**§ 134. Necessity of seisin in wife.**—It was formerly indispensable that there should be an actual seisin, that is, seisin in fact of the land either by the wife, or by the husband in her right; and it was considered that a seisin in law, or constructive seisin, that is a seisin without actual entry or possession, was insufficient to support an estate by the courtesy. The reason for this holding is to be found in the disability of the wife during coverture, whereby it devolved upon the husband to make entry and take possession in her right; and that he might be the more diligent in so doing, he was deprived of his rights in such lands as he failed to enter upon and take possession.<sup>2</sup>

**§ 135. The modern rule.**—But infringements soon began to be made upon this rule, and it is not now adhered to in its literal strictness either in England or in our own country. For when it came about that title might be conveyed without livery of seisin, it was held that the rule applied only to cases where the wife took as heir or devisee, and not where she took by conveyance, which carried with it both the legal title and the seisin.<sup>3</sup>

**§ 136. Effect of modern legislation upon rights of wife.** Again, legislation both in England and this country having largely removed the disability of married women to act in their own behalf, the reason for the rule has ceased to exist. The cases decided from time to time evidence the gradual relaxation of the rule, and the law now is "that actual entry

<sup>1</sup> 2 Blk. Com. 127; Will. R. P. 228;      <sup>2</sup> Will. R. P. (App. ed.) 523.

Malone v. McLaurin, 40 Miss. 161,      <sup>3</sup> Jackson v. Johnson, 5 Conn. 74,  
90 Am. Dec. 320; Oxford v. Benton,      15 Am. Dec. 433.

36 N. H. 695.

or *pedis possessio* is not absolutely requisite, and that if the party is constructively seised, in fact, it will be sufficient.”<sup>1</sup> So that a man may now be entitled to courtesy even in the equitable estate of his wife.<sup>2</sup> Such is the law also where the wife has the final estate in fee, subject to a pending estate for years in another,<sup>3</sup> the present right drawing to it the possession where the holding is not adverse.<sup>4</sup> Again, the possession of one tenant in common is considered the possession of his co-tenants; so it is not necessary, when the wife has an estate as tenant in common, that she should have been actually seised to entitle her husband to courtesy.<sup>5</sup> Such is the case also when the wife is one of several parceners.<sup>6</sup>

**§ 137. Husband can now take in wife's estates not in possession.**—The fact that livery of seisin or delivery of actual possession is no longer necessary enables the husband to take an estate by courtesy in the vacant and unoccupied lands of his wife,<sup>7</sup> and also in lands the title to which descends to her during coverture, but which are in the actual possession of an adverse claimant from the time the title accrues until her death.<sup>8</sup>

**§ 138. Necessity of having issue born, etc.**—It is further essential that there should be issue born alive and during the life-time of the mother in order that the husband may have an estate by the courtesy. If the mother die in labor and the child be thereafter delivered alive, the husband will not be entitled to courtesy, for the essentials of the estate were not fulfilled during the life-time of the mother, and the land descends to the child unfettered by any estate whatever in the husband.<sup>9</sup> For while a child *en ventre sa*

<sup>1</sup> Kent; Jackson v. Shelleck, 8 Johns. 262.

<sup>2</sup> Dugan v. Gittings, 3 Gill, 138, 43 Am. Dec. 306.

<sup>3</sup> Ellsworth v. Cook, 8 Paige, 646.

<sup>4</sup> Malone v. McLaurin, 40 Miss. 161, 90 Am. Dec. 320.

<sup>5</sup> 1 Bishop on Married Women, 504.

<sup>6</sup> Carr v. Givens, 9 Bush, 679, 15 Am. R. 747.

<sup>7</sup> Miller v. Miller, 129 Ill. 630; Davis v. Mason, 26 U. S. 1.

<sup>8</sup> Borland v. Marshall, 2 Ohio St. 308, 6 Gray's Cases, 710.

<sup>9</sup> 2 Blk. Com. 127.

*mere* is to be considered *in esse* for every purpose where it is for the benefit of the child, it is not to be so considered for the benefit of another person.<sup>1</sup>

**§ 139. Necessity of issue capable of inheriting from the mother.**—Whether the child is born alive or not is generally a question of fact and consequently for the jury.<sup>2</sup> It is not, however, necessary to entitle the husband to the estate that the child should be born during the period that the mother is seised. It is only essential in this regard that there should be issue, born alive and capable of inheriting from the mother. As has been said, “If a man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the courtesy, and so if he have issue which die before the descent.”<sup>3</sup>

**§ 140. Inchoate right of husband.**—Until issue is born fulfilling the requirement of the rule the husband has merely an inchoate right, which may or may not ripen into an estate by the courtesy. By marriage the husband acquires a freehold interest during the joint lives of himself and his wife in all such freehold property of inheritance as she was seised of at the time of marriage, and a like interest vests in him in such as she may become seised of during the coverture. Upon the death of the wife, issue having been born capable of inheriting from her, the husband becomes entitled to an estate by the courtesy under the rule.

**§ 141. Some distinctions.**—But the distinction between the estate by the marital right, or the estate of the husband during coverture, and the estate by the courtesy initiate, must always be borne in mind. For it is to be observed that after birth of issue and during coverture the husband is entitled to an estate for his own life and in his own right, and the interest of the wife is a mere reversionary one, dependent on the life estate of her husband; and it is accordingly held that the statute of limitations does not commence to run against her right as such reversioner or against her

<sup>1</sup> *Marselles v. Thalhimier*, 2 Paige Ch. 35, 21 Am. Dec. 66. ✓

<sup>2</sup> See Will. on Circ. Ev. 449.

<sup>3</sup> Coke, 1 Inst. 30a.

heirs until the estate by the courtesy initiate or consummate ceases.<sup>1</sup>

**§ 142. The estate in the present law.**—The estate by the courtesy has been abolished in some of the states of the Union,<sup>2</sup> and in some states<sup>3</sup> the surviving husband is “endowed” with an estate similar to that which a widow takes as dower. In others of the states courtesy is expressly preserved as at common law.<sup>4</sup> In Michigan, Ohio, Nebraska, West Virginia and Oregon the husband has his estate for life whether issue be born or not.<sup>5</sup> In certain of the states<sup>6</sup> courtesy has not been the subject of legislative enactment, and the common law on the subject there prevails. And where statutes are in force giving married women the exclusive ownership and control of their property, the husband will not lose his right of courtesy in any property remaining undisposed of at her death.<sup>7</sup>

**§ 143. Effect of modern statutes.**—It is sometimes said that the operation of these statutes destroys the tenancy by the courtesy initiate, but it is perhaps the better view that, though the estate is materially modified and changed by such enactments, it is not destroyed thereby. During coverture it is said that the property of the wife is clothed with new characteristics, and the estate known as tenancy by the marital right is substantially abolished. Under these statutes the husband’s right to the courtesy in the lands of his wife is contingent and does not vest in him until her death; and so long as she lives, his interest in her lands lacks those elements of property, as power of disposition, liability to sale on execution, etc., which had formerly given to it the character of a vested estate. Therefore the interest which the husband

<sup>1</sup> Foster v. Marshall, 22 N. H. 491,  
6 Gray’s Cases, 707.

<sup>2</sup> California, Colorado, Dakota,  
Georgia, Idaho, Illinois, Maryland,  
Iowa, Kansas, Maine, Minnesota,  
Nevada, Washington, Mississippi,  
South Carolina and Wyoming.

<sup>3</sup> Illinois, Kansas and Maine.

<sup>4</sup> Delaware, Massachusetts, Rhode  
Island, New Hampshire, Vermont,  
and North Carolina.

<sup>5</sup> Stin. Am. St. Law, sec. 3301.

<sup>6</sup> For instance, in Arkansas.

<sup>7</sup> Breeding v. Davis, 77 Va. 639,  
46 Am. R. 740.

had in his wife's lands during her life, under these enactments, was a mere inchoate right which the legislature might destroy.<sup>1</sup>

**§ 144. The husband as tenant by courtesy initiate.**—At common law, however, upon the birth of a child who could by possibility inherit the estate of the wife, the husband had a right as tenant by the courtesy initiate, which was property subject to be taken for debts, and was a vested right which could not be modified or abolished by statute.<sup>2</sup>

**§ 145. Summary.**—The student will no doubt glean from the foregoing that whatever may be taken to be the effect of these statutory enactments, there can be no question that the estate by the courtesy has been to a large extent changed or modified by their operation, and that hence he must look to the enactments and decisions obtaining in the jurisdiction where the particular case under his consideration arises.

**§ 146. Dower — Rights of the wife in lands of her husband.**—Not only does the law invest the husband with certain rights in the lands of the wife, but it also gives to the wife an interest in the lands of which her husband is seised at the date of the marriage and of those of which he may become seised during coverture. This interest of the wife in the lands of her husband is known as "dower."

**§ 147. Origin and history of dower.**—It is not certainly known when the estate of dower was first recognized by the law of England, nor indeed whence it came. Some writers are of the opinion that it was introduced by the Saxons, others that it was adopted from the Goths and Swedes, but probably that view is most nearly correct which regards it as having come in with the other institutions engrafted on the law of England at the time of the Norman conquest. The origin of the institution itself is involved in

<sup>1</sup>Lucas v. Lucas, 103 Ill. 121; Neer v. McNeer, 19 L. R. A. 257. Brown v. Clark, 44 Mich. 309; Martin v. Robson, 65 Ill. 129, 16 Am. R. 578. But see *contra*, Alexander v. Alexander, 1 L. R. A. 125; also 46 Am. R. 740.

<sup>2</sup>Cooley's Const. Lim. 440; Mc-

obscurity. There is high authority for the position that it arose out of the precepts of the Christian religion, and that it was adopted by reason of the amity of the church to improve the condition of women when surviving their husbands, and to better provide for their sustenance in the widowed state, as well as for the nurture and education of the children of the marriage.<sup>1</sup>

§ 148. **Classifications of dower.**—According to Littleton and Blackstone there were five different kinds of dower, or, more strictly speaking, five ways or modes in which a woman could be endowed. These were: (1) Dower by special custom. (2) Dower *ad ostium ecclesie*. (3) Dower *ex assensu patris*. (4) Dower *de la plus belle*. (5) Dower by the common law. The last of these methods was abolished with military tenures, of which it was a consequence.<sup>2</sup>

§ 149. **The classes defined and explained.**—Dower by special custom was where a widow was endowed with a specified portion of her husband's lands in accordance with some local custom. This sort of dower long since fell into disuse, as we find no traces of it after the time of Henry I.<sup>3</sup>

§ 150. **Continued.**—Dower *ad ostium ecclesie*, or at the church door, occurred where a man of full age, seised in fee simple, at the time of marriage, at the church door, where all marriages were formerly celebrated, after affiance and troth plighted between them, endowed his wife with the whole or such part of his lands as he pleased, then and there specifying and ascertaining the same. At an early date he was not allowed to endow her with more than a third part of the lands of which he was seised, though he might give her less. When thus endowed, the wife after the death of her husband might enter into the quantity of land specified without further assignment. She might refuse at the church door to accept the portion set out to her, in which case she would have her common-law dower. But if she did not ob-

<sup>1</sup> See Blk. Com. 130; Maine's Anc. Law (3d ed.), 218.

<sup>2</sup> 2 Blk. Com. 132; Co. Litt., sec. 36 *et seq.*

<sup>3</sup> 2 Blk. Com. 133.

ject at the time of the marriage, and then after the death of her husband entered on the lands, she was concluded from claiming dower by the common law.<sup>1</sup>

§ 151. Continued.—Dower *ex assensu patris* was a species of *ad ostium ecclesie*, and differed from it only in being made when the husband's father was alive, and the son, by his consent expressly given, endowed his wife with parcel of his father's lands.<sup>2</sup>

§ 152. Concluded.—Dower at common law occurred if at any time during coverture the husband became solely seised of any estate of inheritance, that is, in fee simple or fee tail, in lands to which any issue, if issue was had, might by possibility have been heir. Then, and in such case, the wife from that time became entitled on the decease of the husband to have one equal third part of the same lands allotted to her, to be by her enjoyed during the remainder of her life.<sup>3</sup> And this right of dower was paramount to the alienation of the husband and quite independent of his debts.<sup>4</sup>

§ 153. Summary.—So much for the origin and ancient law of dower. When we approach the study of the modern estate of the wife in the lands of her husband, we find our way much impeded by the admixture of the old and the new, as well as by conflicting statutory enactments and decisions of various states and of many tribunals. An attempt will be made, however, to formulate the leading principles of the subject in such a manner as to be of some assistance to the student.

§ 154. Dower in the modern law.—And first it may be said that in general, and with reference to its quantity, dower is of two kinds—an interest and an estate; the former expressing the right of the wife during the life-time of her husband, the latter that to which she shall be entitled if she survive him. During the life-time of her husband

<sup>1</sup> 2 Blk. Com. 133; Co. Litt., secs. 39, 41; 1 Reeves' Hist. of Eng. Law (Am. ed.), p. 354.

<sup>2</sup> 2 Blk. Com. 133; Co. Litt., secs. 40, 41; 6 Gray's Cases, 723.

<sup>3</sup> Will. R. P. 232.

<sup>4</sup> Will. R. P. 233.

the wife has merely an inchoate right, contingent upon her life exceeding that of her husband. But he cannot by any act of his own bar this right in her, or prevent it from ripening into an estate in her at his death, should it occur prior to that of his wife.

§ 155. **Signification of the word "endowed."**—Again, the word "endowed" has in the law its own specific meaning, and when used in its proper sense signifies, as it did at the early common law, that the person endowed shall have an estate for life in the lands of which such person is endowed. This is a pure dower estate. But the term is often improperly made use of to indicate any interest or estate given by law to the wife in the lands of her husband by virtue of the marital relation.

§ 156. **The estate by statute.**—In many of the states dower is still preserved by statute as at common law.<sup>1</sup> In several it is provided that if the husband die without issue, and solvent, the widow shall be entitled to a one-half part of the real estate for life in dower.<sup>2</sup> In a few states, by silence of the statutes or by implication, dower remains as at common law;<sup>3</sup> while in others the widow can have dower in those lands only of which the husband died seised.<sup>4</sup>

§ 157. **Continued.**—In Illinois and in Maine and Minnesota courtesy is abolished, and the surviving husband takes an estate in the wife's lands similar to the dower of the widow at common law.<sup>5</sup> The right intended to be conferred, where such provision is made, is such as previously existed in favor of the widow.<sup>6</sup> In several states where dower for many years did not exist, recent statutes have restored

<sup>1</sup> This is the case in Kentucky, Massachusetts, New York, New Jersey, Ohio, Michigan, Wisconsin, Nebraska, Virginia, West Virginia, North Carolina, Missouri and Oregon.

<sup>2</sup> So in Alabama, Arkansas, Delaware and Maine.

<sup>3</sup> In Maryland, Pennsylvania, Rhode Island and South Carolina.

<sup>4</sup> In Connecticut, Delaware, Georgia, New Hampshire and Tennessee.

<sup>5</sup> See Stim. Am. Stat. Law, sec. 3302.

<sup>6</sup> Heisen v. Heisen, 145 Ill. 658, 21 L. R. A. 434.



to the wife her common-law right, and the tendency is rather to enlarge than to cut off this provision for the widow.<sup>1</sup>

**§ 158. Concluded.**—Dower, strictly so called, no longer exists in a number of the states, but the provisions made by the present statutes in many of them for the widow in the real estate of her husband are rather in the nature of an enlargement than an abolishment of dower. Under such statutes the inchoate right of the wife is of the same general nature as the inchoate right of dower at common law.<sup>2</sup> The estate is treated as of the nature of dower and is governed by the same rules of legal construction.<sup>3</sup>

**§ 159. Dower favored in the law.**—Dower has always been favored in the law, and indeed so highly favored "that next to life and liberty it is held sacred."<sup>4</sup> It is considered of inestimable value to the homes in the states, and the effect of the homestead laws has been to enlarge the provision thus made for the widow.<sup>5</sup> In the absence of statute cutting down the dower, the husband cannot by any alienation or charge defeat the right of the wife after it has once attached.<sup>6</sup>

**§ 160. Incidents of dower.**—Three things were necessary at common law to vest in a woman the right of dower: 1. That her husband should have been seised at some time during the existence of the coverture of the lands in which dower is claimed, either in fee simple or in fee tail. 2. Marriage, as recognized by law. 3. The death of the husband leaving the wife surviving him.<sup>7</sup>

**§ 161. To what lands it attaches and what estates.**—At common law the right attached to all lands of which the husband was seised at any time during coverture; but this

<sup>1</sup> Combs v. Young, 4 Yerg. 218.

<sup>2</sup> See *In re Rausch*, 35 Minn. 291.

<sup>3</sup> Holmes v. Holmes, 54 Minn. 352.

<sup>4</sup> Thayer v. Thayer, 14 Vt. 107,  
39 Am. Dec. 211; Kennedy v. Ned-  
row, 1 Dall. 415.

<sup>5</sup> Blevins v. Smith, 13 L. R. A.  
441.

<sup>6</sup> Grady v. McCorkle, 57 Mo. 172,  
17 Am. Dec. 676. See also opinion  
of Reade, J., in Sutton v. Asken,  
66 N. C. 172, 8 Am. R. 500.

<sup>7</sup> Stevens v. Smith, 4 J. J. Marsh.  
64, 20 Am. Dec. 205.

rule has been changed by statute in many states, so that the right exists only as to the lands of which the husband dies seised, and those which come to the husband through the wife.<sup>1</sup> This right of dower in the wife subsists in virtue of the seisin of the husband, and hence seisin of the husband during coverture is essential. There can be no dower where the husband was never seised.<sup>2</sup> So, generally speaking, a wife has no dower in lands to which the husband has merely an equitable title. But by statute in many states this rule has been changed, so that the right exists in the husband's equitable estates.<sup>3</sup> Nor could a wife have dower in the husband's lands held by him in joint tenancy, nor in trust estates, except where so provided by statute.<sup>4</sup>

**§ 162. Necessity of seisin in husband.**—It is held in some jurisdictions that if the seisin in the husband be merely transitory, as where the very act by which he acquires the fee takes it from him, so that he is merely the conduit for passing it, such momentary seisin will not entitle his widow to dower.<sup>5</sup> Again, where at the time of receiving a conveyance of land a mortgage is given back to secure payment of the purchase-money of the mortgaged land, the seisin is held to be instantaneous and dower does not attach.<sup>6</sup>

**§ 163. Birth of issue not necessary.**—The birth of issue is not essential to the perfection of the right of dower. It is only necessary that by possibility it may happen that the wife may have issue by her husband which may by possibility inherit the estate as heir of the husband.<sup>7</sup> The widow's rights regarding her dower will be determined by the law as it exists at the death of her husband and not as it did at the date of the marriage. Dower is not a right

<sup>1</sup> *Flowers v. Flowers*, 18 L. R. A. 75.

<sup>2</sup> *Bowman v. Bailey*, 20 S. C. 550.

<sup>3</sup> *Hawley v. James*, 5 Paige, 318; *Williams v. Westcott*, 77 Iowa, 332.

<sup>4</sup> *Stevens v. Smith*, 4 J. J. Marsh. 64, 20 Am. Dec. 205.

<sup>5</sup> *Adams v. Hill*, 9 Fost. 202; *Stanwood v. Deming*, 14 Me. 290.

<sup>6</sup> *Storr v. Tift*, 15 Johns. 458, 8 Am. Dec. 266; *Henisler v. Wickem*, 38 Md. 277.

<sup>7</sup> *Litt.*, sec. 53.

founded on contract, and so not within the inhibition of the constitution regarding the violation of contracts.<sup>1</sup>

§ 164. **Inchoate dower interest.**— But though the wife's dower during the life-time of the husband is inchoate and uncertain, it yet possesses the elements of property. The law treats it as a valuable interest. Its actual money value at a given time is estimated by the use of what are known as mortuary tables.<sup>2</sup>

§ 165. **How dower may be barred.**— While the husband has no power to prejudice the wife in the exercise of her right of dower, she may herself bar her dower in either of several different modes. She may join with her husband in a deed of conveyance, or after his death she may convey away her dower either before or after it is set out to her. By accepting a provision made for her in the husband's will in lieu of dower, she will relinquish her right. To do this is, of course, optional with her; she cannot take both, but may choose between them.

§ 166. **Effect of divorce.**— It is generally the law that if the husband obtain a decree for divorce against the wife based on her fault, she shall lose her dower in his lands. And so it is also held that a divorce *a vinculo* for the fault of either party will be a bar to dower in lands thereafter acquired by the husband.

§ 167. **Statutory provisions.**— In nearly all the states there exist statutory provisions providing the method of setting out the dower to the widow. The effect of this proceeding is to reduce the property in which her dower exists to her possession for such an estate as she has therein.

§ 168. **Marriage settlements, jointures, etc.**— There is one method recognized in the law by which a woman may bar her dower, or rather by which she gives up her right ever to have dower. This is done by an agreement entered into prior to the marriage, but in consideration thereof, and

<sup>1</sup> State v. Tuty, 41 Fed. R. 753, 7      <sup>2</sup> Porter v. Noyes, 11 Am. Dec. 30.  
L. R. A. 50.

called a jointure.<sup>1</sup> It generally provides for the giving of lands or other property to the wife, which she accepts in lieu of all claim of dower.<sup>2</sup>

§ 169. **Homestead estates.**— There still remains for our consideration a species of estates for life known as the homestead estate. This estate is purely of statutory origin, and, with somewhat variant provisions, exists in nearly all the states. In a general way it may be said to be an interest in land, usually for the life or lives of those entitled to it, exempt from the demands of creditors. Such estates were created primarily to secure to the householder and his family a home beyond the reach of creditors and thus aid in preventing them from becoming public burdens. The extent and value of the estate differs widely in the various states, and hence in every case reference must be had to the statutes of the particular state in which the property is situated. But it may be said that it is the universal rule that homestead acts are to be liberally construed for the benefit of those entitled to the benefits thereof.<sup>3</sup> The law does not generally require that the claimant of the homestead rights be the owner of a freehold, but allows such rights to be established in the lesser estates,<sup>4</sup> and in some jurisdictions even where the claimant has only an equitable estate.<sup>5</sup> The homestead estate may be sold and conveyed in all the states where it exists, and in most of them it may be mortgaged; the signatures of both husband and wife to instruments for such purposes being a requirement that is universal.

§ 170. **This estate generally for benefit of head of family.**— Though the statutes of the several states make use of different forms of expression indicative of the person or persons who may claim this exemption, yet the general in-

<sup>1</sup> *Re De Hoghton*, 65 L. J. Ch. (N. S.) 667, 74 L. T. R. 613.

<sup>2</sup> *Will. R. P.* 235, 236.

<sup>3</sup> *Barber v. Rorabeck*, 36 Mich. 399; *Deere v. Chapman*, 25 Ill. 610; *Jarvis v. Moe*, 38 Wis. 440.

<sup>4</sup> *Pelan v. De Bevard*, 13 Iowa, 53; *Johnson v. Richardson*, 33 Miss. 462.

<sup>5</sup> *McKee v. Wilcox*, 11 Mich. 358;

*Stafford v. Woods (Ill.)*, 33 N. E. R.

tent of them all is to confer this right upon the actual head of the family,<sup>1</sup> and so it is primarily to the husband, and on his death it inures to his widow. But when the head of the family, a woman may have such rights in lands acquired by her after the death of her husband. As a general rule the claimant must reside in or upon the premises claimed as a homestead estate.<sup>2</sup> The courts have, however, somewhat differed in the construction to be placed upon the word "reside." But it is universally the holding that one cannot claim homestead exemptions in more than one piece of property,<sup>3</sup> and hence that an actual abandonment, or the acquiring of a new homestead, will extinguish the right in the old.<sup>4</sup> For a full discussion of this subject, which it is deemed would be out of place here, the student is referred to Washburn on Real Property, chapter VI, and the cases cited in connection therewith.

<sup>1</sup> *Parsons v. Livingston*, 11 Iowa, 104; *Barney v. Leeds*, 51 N. H. 253.

<sup>2</sup> *Lee v. Miller*, 11 Allen, 37; *Blum*

*v. Carter*, 63 Ala. 235; *Bowker v. Collins*, 4 Neb. 494.

<sup>3</sup> *Atchison v. Wheeler*, 20 Kan. 625; *Donaldson v. Lamprey*, 29 Minn. 18.

<sup>4</sup> *Taylor v. Hargous*, 60 Am. Dec. 607.

# ESTATES LESS THAN FREEHOLD.

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## CHAPTER VII.

### ESTATES FOR YEARS.

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§ 171. **Estates less than freehold.**—We are now to undertake the consideration of estates less than freehold; that is to say, of estates lacking in the quality of freeholds. Certain of such estates may, however, exceed in quantity some of the estates of freehold. For example, an estate given to one for his life is a freehold, while an estate for years, though limited to endure for a period of years far outlasting that of any human life, is not an estate of freehold; for, while sufficient in point of quantity, it falls short in quality. The chief distinction, then, between estates of freehold and those less than freehold is involved in the matter of quality.

§ 172. **How distinguished.**—Again, these estates (freehold and less than freehold) may be distinguished one from the other by the fact that in the freehold estate there is no limitation as to the time for which the estate is to endure, capable of computation in days, months or years; that is, such estates are not limited to end at any fixed date. On the contrary, in estates less than freehold there is always a limitation determining the estate at some definite and fixed time, measurable in days, months or years,<sup>1</sup> and by this means we are always enabled to distinguish between an estate of freehold—as, for instance, an estate for life—and an estate less than freehold, as one for years.

§ 173. **Estates for years.**—Estates for years are the principal example of estates less than freehold, and by estates for years is meant all estates or interests in land which are less than freehold in quality and limited to endure for some fixed period of time. This estate is also often called “a term of years.”

§ 174. **Chattels real.**—Estates for years are known in the law as chattels real, or personal interests in real property, and so are regarded as personalty. This being the case, strictly speaking, no tenure exists between the grantor and the grantee, the possession of the latter being consid-

<sup>1</sup>See exceptions to this rule as to tenancy at will and at sufferance, hereinafter treated.

ered to be that of the former in so far as the question of title is concerned. Being personal property, tenant for years is not *seised* but merely *possessed*, and without seisin there can be no tenure. As a corollary to this proposition, no tenant for years can dispute the title of him of whom he holds, for he himself holds only by virtue of that same title.

§ 175. **The importance of estates for years.**—Estates for years are the most common of all estates at the present day; and inasmuch as the interests therein, both of grantor and grantee, are regarded as personal property, such estates may now be created by parol as well as by deed. But in creating them by parol care must be taken that the provisions of the statute of frauds are not infringed.

§ 176. **Use of term “landlord and tenant.”**—The terms “grantor and grantee” and “lessor and lessee” have in modern times been largely superseded by those of “landlord and tenant,” and the agreement upon which the rights of the several parties are founded is in general termed a “lease.” Now this modern lease differs much from the ancient term of years, for it has grown into a very complicated collection of agreements and covenants made necessary by the changing circumstances of the times. So we shall see that at the present day the lease is not only the conveyance of an interest in the lands, but also of the nature of a contract wherein is expressed the terms and conditions upon which such interest is to be granted by the one party and to be held by the other.

§ 177. **The ancient estate for years.**—But as terms of years are oftentimes met with at the present day which do not partake of the nature of a contract,<sup>1</sup> it may be well for us examine somewhat into the nature of the ancient estate for years.

§ 178. **Terms of years under the feudal system.**—In feudal times no estate less than a freehold could be granted.

<sup>1</sup> For instance, by devise in a will.



It was the custom, however, to allow one to go into possession of lands on certain terms and conditions. But one in such possession of lands had originally no means by which he could protect his possession. For it was then the law that "If a man make a deed of feoffment to another of certain lands and delivereth to him the deed, but not livery of seisin, in this case he to whom the deed is made may enter into the land and hold and occupy it at the will of him who made the deed, but he who made the deed may put him out when it pleaseth him."<sup>1</sup>

§ 179. **At the common law.**—Later, however, the action of ejectment was given the grantee of such term, by means of which he could recover the possession of his holding and damages for the detention thereof.<sup>2</sup> This action of ejectment was a species of the personal action of trespass, in which damages were claimed by a tenant for a term of years complaining of forcible ejection by another than the lessor from the land demised. In favor of this mode of remedy the courts determined that the plaintiff was entitled not only to recover the damages claimed by the action, but should also, by way of collateral and additional relief, recover possession of the land itself for the term of years of which he had been ousted.<sup>3</sup> And this action survives with various modifications by statute to the present day.<sup>4</sup>

§ 180. **Development as an estate.**—Thus the holding of lands by mere possession and for a definite period of time came gradually to assume the characteristics of an estate, and for the purposes of the law are now to be considered as such. The fact that these estates are now so numerous has led to a prodigious amount of litigation and to innumerable statutory provisions concerning their nature, creation and the rights of parties thereunder.

<sup>1</sup> Litt., sec. 70.

<sup>2</sup> Litt., sec. 740.

<sup>3</sup> Stephen on Pleading (Andrews' ed.), 94

<sup>4</sup> Stephen on Pleading (Andrews' ed.), 95 *et seq.*

§ 181. **Certain general principles still in force.**—There are, however, certain well established principles which in general are still adhered to, and to these we shall now devote some attention. And first, there must, in the creation of a term of years, be specified not only a time when the term is to end, but also a date must be fixed at which it shall begin. And, differing from a freehold estate, this date for beginning may be laid *in futuro*, since neither seisin nor livery thereof are incidents of estates for years. But until the tenant enters upon the lands designated in the instrument creating the term he has no estate, but only a right to have and hold the lands for the term specified, and this right is called an *interesse termini*.<sup>1</sup>

§ 182. **Continued.**—Again, though there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain it will suffice.<sup>2</sup> Thus, if A. lease land to B. until the eldest son of B. shall arrive at the age of twenty-one years, and such son is ten years old at the time of the said letting, it will be a good lease, creating a term to endure for fifteen years from its creation.

§ 183. **The estate as between lessor and lessee.**—It is the rule, founded on reasons of convenience and public policy as well as upon the legal propositions hereinbefore set forth, that a tenant cannot dispute the title of his landlord either by setting up a title in himself or in another, during the existence of the lease or tenancy. The principle of estoppel applies in such case, and operates in full force to prevent the violation of the contract under and by virtue of which the tenant obtained and holds his possession.<sup>3</sup> And once a person has become a tenant, so long as he remains in occupation of the land demised, he must be deemed to continue in that character unless he has surrendered the possession to the landlord. So if, after leasing the premises, the tenant purchases another title or acquires rights adverse to those

<sup>1</sup> Will. R. P. 86.

<sup>2</sup> Co. Litt., sec. 45.

<sup>3</sup> *Blight's Lessee v. Rochester*, 7 Wheat. 535.

of the landlord, he must surrender to the latter the possession of the property before he can assert them.<sup>1</sup>

§ 184. **Effect of fraud, etc.**— But if the tenant is induced by fraud or misrepresentation to accept the lease, or where he accepts it because of mistake, or under duress, no estoppel arises.<sup>2</sup> And where once the relation of landlord and tenant is established by the act of the parties, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely, the succeeding tenant being as much bound by the acts and admissions of his predecessor as though they were his own. And hence if a party succeeding a tenant purchase and enter upon the premises under an absolute conveyance from the tenant, he is deemed to have entered as the tenant of the landlord and to hold the possession subject to all the duties and responsibilities appertaining to that character.

§ 185. **Exception to rule.**— The student should be apprised, however, that there are certain exceptions to this rule, and that its doctrine applies only to the actual relation of landlord and tenant as created by contract, and not to tenancies arising by mere implication or construction of law,<sup>3</sup> and must be confined to the title had at the time possession is given.<sup>4</sup>

§ 186. **As to tenant's right of enjoyment, etc.**— Tenant for years has substantially the same rights and powers with reference to enjoyment and alienation as those possessed by tenant for life. But in the modern lease there are commonly included many express covenants and agreements which materially affect the rights of the parties thereto. The nature of these covenants and agreements is circumscribed only by the general law of contracts, and hence will not be specially treated in this work.

<sup>1</sup> *Brown v. Geller*, 32 Ill. 151, 83 Am. Dec. 258.

<sup>3</sup> *James v. Patterson*, 1 Swan, 309, 55 Am. Dec. 737.

<sup>2</sup> *Miller v. McBorer*, 14 S. & R. 382; *Shultz v. Ellicott*, 11 Humph. 183.

<sup>4</sup> *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358.

§ 187. **Covenants.**—Of the implied covenants, by which are now indicated the several agreements that arise by implication on the making of every contract of letting such as we are considering, the covenant of quiet enjoyment running to the tenant deserves especial mention. Under it the landlord is bound to do, or suffer to be done, no act the consequences of which will be to materially affect the rights of the tenant in the enjoyment of his holding. Out of this rule has grown the doctrine of *eviction*. This word was formerly used to denote an expulsion by the assertion of a paramount title and by process of law. But that sort of an eviction is not now necessary to justify the tenant in declaring the term at an end and refusing longer to be bound by the terms thereof. Nor indeed is an actual physical expulsion longer requisite to protect the tenant in abandoning the term, for it is now held that any material interference on the part of the landlord with the tenant's beneficial enjoyment of the demised premises will amount to an eviction in law.<sup>1</sup>

§ 188. **Eviction.**—But it should be clearly understood that, to constitute an eviction in law, the act of the landlord must be so treated by the tenant, and the term declared ended by the latter either expressly or by his abandonment thereof. For even though the landlord were guilty of acts amounting to an eviction, yet if tenant fail to treat the acts as such and remain in the premises he will still be bound by the covenants in the lease.

§ 189. **Power to under-lease.**—In the absence of a covenant to the contrary, a tenant for years may make an under-lease for any part of his term; so any assignment for less than the whole term is in effect an under-lease. Every sublessee is tenant to the original lessee, and not to the original lessor, until attornment has been had; for the derivative term is not an estate in the interest originally granted, but is a new and distinct term for a different period of time.<sup>2</sup>

<sup>1</sup> Hoeveler v. Fleming, 91 Pa. St. 322.

<sup>2</sup> Will. R. P. 407.

§ 190. **Assignment.**—The rule is that any assurance purporting to be an under-lease, but which comprises the whole term, is in effect an assignment and not an under-letting. This results by operation of law, without regard to the particular form of the instrument.<sup>1</sup> An under-lease is therefore to be distinguished from an assignment of the term by the fact that in the former there is always reserved a reversion in the lessor.<sup>2</sup> The importance of the distinction between an under-letting and an assignment of a term lies in the fact that if it be the former no privity of contract exists between the original lessor and the sub-lessee, while in the latter the assignee becomes tenant of the original lessor.<sup>3</sup>

§ 191. **Definition of modern lease.**—A lease is defined to be a contract by which one person divests himself of, and another takes the possession of, lands or tenements for a certain term.<sup>4</sup> Its effect as a matter of law is to convey, upon certain terms and conditions, an interest in real property. No precise form of words is necessary to a transfer of this nature. While, strictly speaking, a lease is an indenture, yet, if the writing be signed by one party and acted upon by the other, its terms will be binding upon both.<sup>5</sup> A lease is distinguished from a license by the fact that it confers the sole right to possession upon the lessee.<sup>6</sup>

§ 192. **Creditors' rights.**—Leasehold interests, in common with all other personal property, are subject to involuntary alienation for payment of debts, and the interest of either lessor or lessee may be so taken. Tenant for years takes and holds subject to the exercise of the power of eminent domain, and a taking under such power does not

<sup>1</sup> Will. R. P. 406; *Craig v. Summons*, 15 L. R. A. 236.

<sup>4</sup> Wood, *Landlord & Tenant*, sec. 203.

<sup>2</sup> *Sexton v. Chicago Storage Co.*, 129 Ill. 327.

<sup>5</sup> *Alcorn v. Morgan*, 77 Ind. 184.

<sup>3</sup> *Salisbury v. Shirley*, 66 Cal. 225; *Thomas v. Connell*, 5 Pa. St. 13.

<sup>6</sup> *Heywood v. Fulmer*, 18 L. R. A. 490.

amount to an eviction, nor in itself absolve tenant from payment of rent.<sup>1</sup>

**§ 193. Effect of destruction of premises.**—As a general proposition, the destruction of the premises, either in whole or in part, by any act other than that of the lessor, will not relieve the lessee from payment of rent for the term.<sup>2</sup> The reason of this rule lies in the fact that the lessee is regarded in the law as the owner of an interest or estate in the premises, and so if they be destroyed the loss must fall upon him.<sup>3</sup>

**§ 194. Importance of distinction between surrender and forfeiture.**—The distinction between a surrender and a forfeiture becomes important from the fact that, where a landlord elects to accept a surrender of the lease, he takes back the premises subject to liens existing at the time against the estate of the lessee. A written lease, even if under seal, may be surrendered by parol or by an agreement, either express or inferable from the conduct of the parties. Thus, an offer by lessee to surrender, followed by the taking of possession by the lessor, amounts to a surrender and acceptance thereof.

**§ 195. Effect of breach.**—Upon a breach of conditions on the part of the lessee, the lease continues valid until the lessor evidences his intention to avoid it. But after breach of such conditions it is of course void so far as the rights of the lessee are concerned. And under such circumstances, if the lessor by deed or act affirms the lease, the rights and obligations of both parties will continue as if no such breach had been suffered.

**§ 196. Right to declare a forfeiture.**—Forfeitures, not being favored either at law or in equity, are always strictly construed.<sup>4</sup> And the right to declare a forfeiture must be expressly and distinctly reserved. But where the term is created by an instrument in writing and the date for its end-

<sup>1</sup> Foote v. Cincinnati, 11 Ohio, 403, 38 Am. Dec. 737; Dyer v. Wrightman, 66 Pa. St. 425.

<sup>2</sup> Warren v. Wagner, 75 Ala. 188, 51 Am. R. 446.

<sup>3</sup> Changed by statute in many states; also frequently by stipulation in the lease.

<sup>4</sup> Westmoreland, etc. Gas Co. v. Dewitt, 5 L. R. A. 731.

ing is specified therein, the lessee will be entitled to no further or other notice in order to render him guilty of holding over.

**§ 197. Changes made by statutes, etc.**—The modern laws, both by statute and precedent, having, as we have seen, made so many changes of importance in regard to estates for years, it would hardly be advisable to take leave of this subject without giving some attention to the more radical of such alterations.

**§ 198. Continued.**—Thus, at the present day, where a parol lease is made, but not in writing, fixing the amount of rent and the time of its payment, and fixing the term at a greater period than one year, and the tenant enters thereunder and makes monthly payments of rent, a tenancy from month to month is created, though the agreement itself is clearly within the statute of frauds; the modern rule being that the agreement will govern in every respect except as to the length of time.<sup>1</sup>

**§ 199. Continued.**—A similar rule applies where a person goes into possession under a lease void for a longer period than one year, and remains in possession with consent of the landlord for more than one year, under circumstances permitting the inference of his tenancy from year to year; and in such case the landlord may treat him as such a tenant, and the latter could not relieve himself from liability for rent up to the end of the current year.<sup>2</sup>

**§ 200. Continued.**—What amounts to an eviction has already been explained, and it has been shown that now it is no longer necessary, as formerly, that there should be actual physical expulsion, but that any acts of the landlord of a grave and permanent character which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the premises in any material degree will constitute an eviction. But even after such

<sup>1</sup> Browne, St. of Fr., sec. 39; *Mars Barlow v. Wainwright*, 22 Vt. 88, v. Ray, 151 Ill. 340, 26 L. R. A. 799. 52 Am. Dec. 79.

<sup>2</sup> *Condict v. Cohn*, 118 N. Y. 309;

acts have been committed, if the tenant still remain in possession of the premises his obligation to pay rent remains. Tenant, therefore, cannot remain in possession and defend the landlord's claim for rent on the ground of an eviction, either actual or constructive.<sup>1</sup>

§ 201. *Continued.*—At common law, though the leased premises were destroyed by fire, or by the act of God or the public enemy, the tenant was, nevertheless, obliged to pay rent. But by statute and precedent this rule has been very generally abrogated, and the custom also very generally obtains of inserting a clause in the lease protecting the rights of both lessor and lessee in this regard.<sup>2</sup>

§ 202. *Continued.*—When rent is made payable quarterly or at other stated intervals in advance, the tenant has the whole of the first day of each succeeding interval in which to pay it, for the law recognizes no division of a day in this regard.<sup>3</sup> In the absence of special custom in the locality in which the premises are situated, and of any contract as to the time when the rent is to be payable, it is not due until the expiration of the term.<sup>4</sup>

§ 203. *Rental upon shares.*—Though the rent is to be paid by a portion of the crop, lessor and lessee are not tenants in common of the crop, the title thereto being in the tenant. Whether, however, the relation of landlord and tenant exist between the parties, or they are tenants in common as to the crop, is a question of intention.<sup>5</sup>

§ 204. *Merger.*—It is a general principle that where, before the expiration of the term, tenant obtains the fee of the premises, the rent for the remainder of the term will be extinguished.<sup>6</sup>

§ 205. *Use and occupation.*—No action for rent *eo nomine* can be maintained unless the conventional relation of

<sup>1</sup> Chicago L. News Co. v. Browne, 103 Ill. 470, 74 Am. Dec. 108.

<sup>2</sup> See Stimson, Am. Stat. Law (Title "Estates for Years"), for such statutes.

<sup>3</sup> Sherlock v. Thayer, 4 Mich. 355, 66 Am. Dec. 539.

<sup>4</sup> Dixon v. Nicolls, 39 Ill. 372, 89 Am. Dec. 312.

<sup>5</sup> Allwood v. Ruckman, 21 Ill. 200.

<sup>6</sup> Martin v. Seavy, 3 Stin. 50, N. A. D. 64.



landlord and tenant exists. But it was long ago established that where there was no agreement for rent, the landlord might recover a reasonable satisfaction in an action for use and occupation, and such action is in the nature of *assumpsit* on an express or implied contract.<sup>1</sup>

§ 206. **Distress.**—The old common-law remedy of distress has been abolished in many of the states, and where it exists at all it has been greatly modified by statute. Mr. Taylor says: "In modern times the whole policy of the law respecting distress has been changed, and a distress for rent is now no more than a mere summary method of seizing and selling the tenant's property to satisfy the rent which he owes."<sup>2</sup> The remedy being so largely regulated by statute in all its essential particulars, a further discussion of it here would be inopportune and no doubt without profit. The student is therefore referred to the statutes of the different states for the determination of the various questions arising on this head between the parties to an estate for years.

<sup>1</sup> *Fittswald v. Beebe*, 7 Ark. 305,  
46 Am. Dec. 285.

<sup>2</sup> *Taylor, Landlord and Tenant*,  
sec. 557.

## CHAPTER VIII.

### TENANCY FROM YEAR TO YEAR, AT WILL, AND AT SUFFER- ANCE.

- § 207. From year to year.
- 208. Continued.
- 209. Holding over.
- 210. Tenancy at will.
- 211. Continued.
- 212. How regarded in some states.
- 213. Entry under agreement for lease.
- 214. Tenancies at will not favored in the law.
- 215. Effect of intention of parties.
- 216. Emblements in estates at will.
- 217. Notice to quit.
- 218. How tenancy terminated.
- 219. Tenancy at sufferance.
- 220. Continued.
- 221. Definition and incidents.

§ 207. From year to year.—When a lessee continues to occupy the premises after the expiration of the time limited in the contract of letting, the terms on which he continues so to hold are matters of evidence rather than of law.<sup>1</sup> It was held at an early date that a general occupation was an occupation from year to year, and it has been declared to be the settled law that whenever the relation of landlord and tenant exists without any limitation as to the duration of the term, such tenancy shall be one from year to year.<sup>2</sup>

§ 208. Continued.—But though every occupation under the above circumstances is *prima facie* regarded as a tenancy from year to year, yet in such case it may be shown that it is in fact one at will, or one to be determined on the

<sup>1</sup> Nager, etc. v. Tyler, 81 Q. B. 95,  
3 Gray's Cases, 429.

<sup>2</sup> Doe d. Martin v. Walls, 7 T. R.  
83.

happening of some event agreed upon by the parties, either expressly or by implication.<sup>1</sup>

§ 209. **Holding over.**—It is important to note in this connection that where a tenant holds over without any new agreement he impliedly holds subject to all the covenants in his lease, and the law imposes upon him those terms which are found in the contract which has expired.<sup>2</sup> Again, a tenancy from year to year is not terminated by the death of the tenant, but devolves upon his personal representatives.<sup>3</sup> But where a tenant holds over, even for a long space of time, without paying rent, and without the consent of the landlord, he will be but tenant at sufferance, and a demand for rent made upon him by the landlord at the end of the period of his holding will not convert his tenancy into one from year to year.<sup>4</sup> To sum up, then, we may properly conclude that a tenancy from year to year may be distinguished from the conventional term of years by the fact that in a tenancy from year to year the duration of the term is not limited by agreement of the parties.<sup>5</sup>

§ 210. **At will.**—A tenancy at will arises when a person lets land or premises to another to be holden at the will of the lessor; that is, for so long as the lessor may permit the holding to continue. But a leasehold estate which is upon the will of one party is equally at the will of the other; and as the tenant at will may be turned out when the lessor pleases, so also may the tenant quit the premises when he likes, though neither party is permitted to exercise his pleasure in a manner contrary to equity and good faith.<sup>6</sup>

§ 211. **Continued.**—A tenancy at will may be created either by parol or by deed. Under the statute of frauds, as enacted in most of the states, a lease by parol for a term

<sup>1</sup> *Stedman v. McIntosh*, 4 Ired. L. 291, 42 Am. Dec. 122.

<sup>2</sup> *Vroman v. McKaig*, 4 Md. 450, 59 Am. Dec. 85.

<sup>3</sup> *Doe v. Porter*, 3 T. R. 13.

<sup>4</sup> *Condon v. Barr*, 47 N. J. L. 113, 54 Am. R. 121.

<sup>5</sup> *Ketchen v. Pridgen*, 3 Jones' L. 49, 64 Am. Dec. 593.

<sup>6</sup> *Co. Litt.* 55a; 4 *Kent's Com.* 111; *Knight v. Ind. etc. Co.*, 47 Ind. 105, 17 Am. R. 692.

longer than one year is ineffectual to vest any term whatever in the lessee, and when he goes into possession under it, with the consent of the lessor and without any further agreement, he is considered a tenant at will, merely subject to pay the stipulated rent money as for use and occupation.

§ 212. **How regarded in various states.**—In some states every tenancy or occupation is considered a tenancy at will until the contrary is shown. In others such an occupation without the owner's knowledge or consent would be a trespass. In still other jurisdictions it is regarded as a tenancy at sufferance, and quite generally as a tenancy from year to year.

§ 213. **Entry under an agreement for lease.**—Where one enters under a written agreement for a lease which he afterwards refuses to accept, or under a contract to purchase which he fails to perform, he will become a tenant at will.<sup>1</sup>

§ 214. **Tenancies at will not favored in the law.**—Leases creating tenancies at will, being inconvenient to both parties, are rarely met. And the courts have established the rule that if a lease be made generally, providing for an annual rental, whether the same be payable in instalments or not, without an express statement that it is at will, a tenancy from year to year will be created.<sup>2</sup>

§ 215. **Effect of intention of the parties.**—But notwithstanding the rule just above announced, and even in a case where the rent is reserved annually for an indeterminate period, regard will be had to the intention of the parties, and if it appear that a tenancy at will was intended it will be so construed.<sup>3</sup>

§ 216. **Emblements.**—If tenant at will be turned out by the landlord he is allowed to reap what he has sown; that is to say, he is allowed emblements.<sup>4</sup> But tenant at will is not answerable for mere permissive waste.<sup>5</sup>

<sup>1</sup> Weed v. Linsley, 88 Ga. 686; Doe d. Tomes v. Chamberlaine, 5 M. & W. 14, 3 Gray's Cases, 425.

<sup>3</sup> Doe d. Bristow v. Cox, 11 Q. B. 122, 3 Gray's Cases, 432.

<sup>2</sup> Doe d. Bristow v. Cox, 11 Q. B.

<sup>4</sup> Ellis v. Paige, 1 Pick. 43, 3 Gray's Cases, 441.

122; Co. Litt. 55a, note 3.

<sup>5</sup> Harnett v. Maitland, 15 M. & W. 257.

§ 217. **Notice to quit.**—In cases where the evidence shows no intention of creating a tenancy at will, the courts, as we have seen, construed such a tenancy to be one from year to year; and so it came to be required that in such cases the tenant should have for his protection a reasonable notice to quit the holding in order “that no sudden determination of the estate by the caprice of the lessor should immediately dispossess him.”<sup>1</sup> The length of time specified to be given is generally regulated by statute in the various states.

§ 218. **How tenancy terminated.**—A tenancy at will may be terminated by demand, by entry, or by any act inconsistent with the duration of the tenancy; as, for instance, by the death of the tenant, an assignment of the landlord’s interest, or by a sale of the land. As we have seen, at common law no notice to quit was necessary. There may be either an express ouster or an implied one, and in either case the act of the landlord will effect a termination of this sort of tenancy; for in this as in other respects there is no distinction between a tenancy at will expressly created and one created by circumstances or by operation of law.<sup>2</sup>

§ 219. **Tenancy at sufferance.**—A tenancy at sufferance is the least in importance of the estates less than freehold, and always arises from implication and not by special or express agreement.<sup>3</sup> A tenant at sufferance has merely a naked possession and stands in no privity with the landlord. Such tenancies arise out of a variety of transactions and circumstances. As, for instance, where a lease is for a definite term, and after its expiration the tenant holds over while negotiations are pending for a new lease, he is strictly at sufferance.<sup>4</sup> So where, pending a contract of purchase, one takes a lease for a month and then holds over.<sup>5</sup>

§ 220. **Continued.**—At common law tenant at sufferance was not liable for rent. But now it seems the general rule,

<sup>1</sup>Jackson d. Livingstone v. Bryan,  
1 Johns. 322, 3 Gray’s Cases, 412.

<sup>2</sup>West. etc. Tel. Co. v. Fain, 52  
Ga. 18.

<sup>3</sup>Alpine, etc. Sch. Dist. v. Batsche,  
29 L. R. A. 576.

<sup>4</sup>Williams v. Laidlaw, 171 Pa. St.  
369.

<sup>5</sup>Moore v. Smith, 56 N. J. L. 446.

that he is held for use and occupation for such time as the landlord does not elect to treat him as a trespasser. As we have seen heretofore, this is not technically an action for rent, which is always the subject of special agreement. Tenant at sufferance, being entitled to no notice to quit,<sup>1</sup> is compelled to give none, and so may abandon the premises at his pleasure. In some states, however, the statutes have practically given to this estate the attributes of an estate or tenancy at will, and in such states notice is required.

§ 221. **Definition and incidents.**—A tenancy at sufferance may be defined to be that estate or interest which arises where a person who has originally come into possession of lands by lawful title holds such possession without right after his title has determined.<sup>2</sup> It has been said that this sort of tenancy seems to have arisen out of a desire on the part of the courts to prevent the condition of adverse possession between the parties when a particular estate determined without the knowledge of the person entitled to the reversion.<sup>3</sup> Such interests, estates or tenancies have, very generally, been greatly modified by statute, and have lost their importance to a large extent. A further consideration of them would therefore be of little profit to the student.

<sup>1</sup> Ibid.

<sup>2</sup> Will. R. P. 390.

<sup>3</sup> Rouse's Case, Tudor's Leading Cases, R. P. 9.

## CHAPTER IX.

### JOINT ESTATES.

- § 222. Their nature.
- 223. Joint tenancies.
- 224. At the early law.
- 225. In the modern law.
- 226. The four unities.
- 227. Can take only as purchasers.
- 228. May exist in any estate.
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- 231. In the modern law.
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- 233. No unity of interest necessary.
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- 238. Subject to marital estates.
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- 241. Its incidents.
- 242. Standing in our law.
- 243. Tenancy by entireties.
- 244. Powers of tenants.
- 245. Standing in our law.
- 246. Termination.

§ 222. *Their nature.*—We have already learned that two or more persons may have different estates in the same lands at the same time. We are now to observe that different persons may have the same estate in lands at one and the same time. In such case the persons having such estates are said to hold either as joint tenants, tenants in common, as coparceners, or by entireties; for it is the law that with respect to the number and connection of the owners of real estate, lands and tenements may be held in five

different ways—the four above mentioned, together with the earlier explained manner of holding alone, or, as it is oftentimes termed, in severalty.<sup>1</sup>

§ 223. **Joint tenancies.**—A joint tenancy arises where two or more persons, at the same time, by the same title, and taking each the same interest, enter into the possession of lands. This sort of tenancy is further distinguished by what is known as the right of survivorship.<sup>2</sup>

§ 224. **At the early law.**—Joint tenancy was greatly favored in the more ancient law of England, and formerly in every instance where lands were conveyed to two or more persons, without specific designation as to how they should hold the same, they were held to take as joint tenants; that is to say, they so held unless the gift or conveyance especially set forth that some estate other than a joint tenancy should be thereby created. “For,” says Mr. Cruise, “the law will interpret a grant of this kind so as to make all its parts take effect, which can only be done by creating an equal interest in all who take under it.”<sup>3</sup> The reason for this ruling is to be found in those provisions of the feudal system which tended to restrict free alienation. By the expression “the right of survivorship” is meant that upon the death of one of the tenants his interest passes not to his heirs, but to his surviving co-tenants, and so on until but one of such tenants remains, whereupon the entire estate vests in such survivor, and at his death in his heirs.<sup>4</sup> So long as two or more tenants were in being, each and every such tenant had but a sort of estate for life, and so could convey no fee unless by joining the others with him, and thus in joint tenancies the power of free alienation was restricted.<sup>5</sup>

<sup>1</sup> There is an apparent exception to this rule where property is held jointly for trade purposes, *i. e.*, in a partnership, especially as to survivorship.

<sup>2</sup> Blk. Com. 180; 4 Kent, Com. 361.

<sup>3</sup> Greenl. Cruise, Dig., ch. “Joint Tenancies.”

<sup>4</sup> 1 Washb. Real Prop. 643.

<sup>5</sup> Co. Litt. 273b.



§ 225. **In the modern law.**— But our modern law, in accord with its policy of free and unrestricted alienation, looks with disfavor upon tenancies of this nature, and especially disaffirms therein the incident of survivorship. Indeed, to such an extent has this doctrine been carried, that at the present day these tenancies with their attendant incidents have been abolished either by legislation or precedent, or both, in nearly all of the states of the Union.<sup>1</sup> Notwithstanding this fact, however, their study is still of importance to the student, not only by reason of their historical value, but for the reason that without an understanding of their nature he could not determine what had or what had not a place in our present law.

§ 226. **The four unities.**— Joint tenancies are said in every case to require the “four unities,” viz.: time, title, interest, and possession. By which is meant that in order to the creation and duration of such a tenancy each tenant (1) must have acquired his rights at the same time and by the same gift or conveyance; (2) that each and every tenant must derive his title from the same source, that is, from the same person or persons; (3) that the estate or interest taken by each tenant must be identical in point of duration or quantity with that of the others; and (4) that all the tenants must not only come into possession at one and the same time, but that they must be seized not in severalty but *per my et per tout*; that is, each of them has the entire possession as well of every part as of the whole, constituting, so to speak, a sort of joint seisin. Any joint estate lacking in these essentials as a whole cannot be a joint tenancy.

§ 227. **Can take only as purchasers.**— Joint tenants can take only as purchasers — never by the mere act of law; for the law casts the burden of the estate upon the heirs with the implication that it is to be to them and to their heirs,

<sup>1</sup> See 1 Washb. Real Prop. 644, tenancy in common. But in many note. In most of the states a gift states joint tenancy will be upheld to several persons jointly, except if properly limited. This is the to them as trustees, will create a rule, for instance, in Illinois.

thus excluding the idea of survivorship.<sup>1</sup> Nor can artificial persons (corporations) take such an estate or become joint tenants with natural persons.<sup>2</sup> Under the common law husband and wife could not take in joint tenancy; the identity of the wife being merged in that of the husband, they were in contemplation of law but one person. But since the almost universal passage of acts whereby the wife is given a separate and distinct status in the law from that of the husband, it is evident that the reason for this rule, together with the rule itself, have ceased to exist.

§ 228. **May exist in any estate.**—So far as quality and quantity are concerned, any legal estate may be granted to be taken in joint tenancy. Thus, we may have joint tenants in an estate in fee simple, for life, for years, etc. The words generally made use of in limiting an estate of the kind under consideration are, “to have and to hold unto them, and each of them, as joint tenants, with the right of survivorship.” It is here to be borne in mind that at the present day a gift or conveyance made to two or more persons, without words designating how they are to hold, will, even in those jurisdictions where joint tenancies are permitted, confer upon such persons a tenancy in common.<sup>3</sup> The most usual instance of joint tenancies at the present day occurs where real property is conveyed to two or more persons to be holden by them as joint trustees, in which case, upon the death of one, the estate vests in those who survive him.<sup>4</sup>

§ 229. **No ouster by co-tenant.**—One joint tenant cannot be disseised or ousted by his co-tenants, because, as has been seen, the possession of one is that of all, and of all that of one. But such a tenancy may be destroyed by the severance or discontinuance of any one of the four unities except that

<sup>1</sup> 2 Washb. Real Prop. 643.

<sup>2</sup> Corporations having perpetual succession, there could be no survivorship.

<sup>3</sup> Hence the necessity of technical

words when the estate in question is desired to be created.

<sup>4</sup> Parson v. Boyd, 20 Ala. 112; Kennedy's Appeal, 6 Pa. St. 511; Miles v. Fisher, 10 Ohio, 1.

of *time*. So if alienation be made by one tenant to a stranger, the joint tenancy will come to an end, for the unity of title is no longer observed. So, also, the tenancy may be determined by the several tenants joining in a deed to a stranger, or by all of them conveying by release to one of their own number. Partition,<sup>1</sup> which is a proceeding in court for the equitable division of joint estates, may be had in the case of joint tenancies, and the decree or judgment of the court therein, allotting to each tenant his just share of the lands or of the proceeds of a sale thereof, will of course put an end to the joint tenancy.

§ 230. **Tenancies in common.**—Where lands are holden by two or more persons with unity of possession only, such persons are said to be tenants in common thereof, and right of survivorship is not an incident of tenancies of this sort.<sup>2</sup>

§ 231. **In the modern law.**—At the early law, in every joint estate where the “four unities” were observed, a joint tenancy resulted. But such is not now the case, and hence, though the unities may all be present, the law construes the holding to be a tenancy in common, unless there be some specific words in the limitation sufficient to create a joint tenancy. So if gift or conveyance be made to two or more persons, and no direction made therein as to *how* they shall hold the lands, they will take the same as tenants in common.<sup>3</sup>

§ 232. **How created.**—Tenancies in common may arise either by descent or purchase, and are the most usual of the joint estates. In point of fact they have very generally succeeded all other forms of joint holding.

§ 233. **No unity of interest necessary.**—In a tenancy of this nature, one tenant may hold a fee, another an estate for life, for years, etc., for there need be no unity of *interest*. So one tenant may have held his interest for a long period

<sup>1</sup> The proceedings for partition are regulated by statute in the various states.

<sup>2</sup> 2 Blk. Com. 191.

<sup>3</sup> 4 Kent's Com. 367; Church v. Church, 15 R. I. 138; Heisky v. Clark, 35 Ark. 17, 37 Am. R. 1.

of years, while another may have come in but yesterday, as the unity of *time* is not essential. Again, one may hold as a purchaser and another by descent, or all may hold as purchasers of different persons, or by descent from several ancestors, since the unity of *title* is not a requisite.<sup>1</sup>

§ 234. **As to seisin.**—Furthermore, the seisin of tenants in common is in reality in severalty; that is to say, each tenant is of himself seised of an undivided interest in all the lands so held. And he has not merely a sort of life estate, as in joint tenancy, but an interest which he may convey, and so invest a stranger with the entire interest which he may have, and in so doing will not destroy the tenancy in common, but simply put another in his place and stead. For example, if A., tenant in common with B. and C., should alienate to D., D. would come into the interest or estate theretofore held by A., and the rights and interests of B. and C. would in nowise be affected.

§ 235. **The operative words.**—The words generally made use of to create a tenancy in common are, “to have and to hold an undivided interest (stating the nature of the interest or estate to be taken) as tenant in common with (here inserting the names of the other tenants).” But, as has been above remarked, a gift or conveyance simply to A. and B. without specification as to their manner of holding, will give rise to a tenancy in common. So if one seised of an estate of freehold, or possessed of a lesser estate, dies intestate, his heirs (if there be more than one) will take such estate as tenants in common.

§ 236. **No actual disseisin necessary.**—Though the seisin of each tenant is several, yet his possession and seisin is for many purposes that of all the tenants; for he can have no possession or seisin adverse to his co-tenants, as it is all in support of their common title.<sup>2</sup> But yet one tenant in common may disseise another, as, for instance, by preventing him from entering upon the land, and in such event the wronged

<sup>1</sup> 1 Preston on Estates, 139.

lin v. Kidder, 7 Vt. 12; Mills v.

<sup>2</sup> Brown v. Hogle, 30 Ill. 119; Cat- Roof, 121 Ind. 360.

person would be entitled to his action of ejectment. But it is not to be understood that an actual ouster *vi et armis* is contemplated in this regard, for it is held that actual possession by one tenant, with denial of right as to the others for a long space of years, will be sufficient evidence from which a jury may say that there was an actual ouster.<sup>1</sup>

**§ 237. Tenants' rights as to each other.**— If in any case one tenant shall appropriate to himself the rents and profits of the entire holding, or shall commit waste, or shall destroy the value of the interests of his companions, such tenant shall be liable in an action by the injured ones to account to them for such loss or damage as they may severally sustain by reason of such wrongful acts. The form of such actions will generally vary with the jurisdiction; at the common law an action of account would lie in the first case, an action of trespass on the case in the second, and an action of trespass in the third.<sup>2</sup> So one tenant in common may maintain trespass against a stranger for acts committed resulting in injury to the estate as a whole.<sup>3</sup>

**§ 238. Subject to marital estates.**— Tenants in common who are seized of estates of inheritance, as is oftentimes the case, hold the same subject to the marital estates of dower and courtesy; and in the case of lands held in partnership, unless the same are purchased with the funds and for the benefit of the enterprise, the rule in general makes them subject to the same estates.

**§ 239. How destroyed or terminated.**— Tenancies in common may be destroyed or terminated in several different ways. It may be done by a partition, either voluntary or by proceeding in court. When voluntary it is accomplished by the interchange of deeds among the co-tenants, by means of which each becomes seised or possessed of his individual share freed from the rights or claims of the oth-

<sup>1</sup> Richards v. Richards, 75 Mich. 408; Owen v. Morton, 24 Cal. 327. subjects, Woolley v. Schrader, 116 Ill. 29.

<sup>2</sup> Bowen v. Swander, 121 Ind. 164. <sup>3</sup> Voss v. King, 33 W. Va. 236.  
See also for discussion of kindred

ers. The proceeding in court leads to the same result in general, and is regulated in its details by statute in the various states. Another method of ending the tenancy in common is for each tenant to join in a conveyance to a stranger, or for the others to make gift to one of their number. The result is the same whatever mode of procedure is followed, and in each case the tenancy in common is destroyed.<sup>1</sup>

§ 240. **Coparcenary.**—An estate in coparcenary arises where a person seised of lands and tenements in fee or in tail dies, leaving only female heirs, in which case the estate descends to such heirs jointly. They are then said to hold in coparcenary, and to make but one heir to their ancestor.

§ 241. **Its incidents.**—The incidents of this estate are in many respects identical with those of joint tenancy. There are present the unities of title, interest, and possession, that of time alone being unessential. But coparceners always take by descent, whereas joint tenants always come in by purchase. Nor does the right of survivorship attach to an estate in coparcenary, because each tenant is entitled to the whole of a distinct moiety, and the interest of each descends severally to his heirs, though the unity of possession continues. In all other material respects these estates do not differ from the other joint estates which we have just been considering.

§ 242. **Standing in our law.**—But brief space is here allotted to the study of estates in coparcenary for the reason that they have never gained great standing in our country. For, as lands here descend to all the children equally, there can be no substantial difference between coparceners and tenants in common; and hence when there are circumstances which in the English law would give rise to an estate in coparcenary, it is with us determined by the law to be a tenancy in common.<sup>2</sup>

§ 243. **Tenancy by entireties.**—The final one of the joint estates which we shall consider is that of tenancy by en-

<sup>1</sup> 2 Blk. Com. 194.

<sup>2</sup> Kent's Com. 367; Bishop v. McClermand's Ex'rs, 16 Atl. R. 1.

tireties, which is created by the grant of an estate in fee to a man and his wife. Under such circumstances, they are neither joint tenants nor tenants in common; for, being considered (at the common law) as but one person, they cannot take the estate by moieties, but both are seised of the *entirety*, and consequently the name of this estate.<sup>1</sup>

§ 244. **Powers of tenants.**—Neither the husband nor wife can dispose of any part of the holding without the assent of the other, since each is seised of the whole, and it must, therefore, remain to the survivor. For the same reason they are not compellable to make partition.<sup>2</sup>

§ 245. **Standing in our law.**—Tenancy by entirety has been generally recognized in the United States as one of the common-law incidents of marriage, and still exists wherever it has not been expressly or impliedly abrogated by statute. But in many of the states it has been held that the married woman's acts, having destroyed the common-law unity of husband and wife, have, therefore, practically abolished the estate by entirety.<sup>3</sup> It is sufficient, however, to give the subject importance, that we bear in mind that the estate is still recognized in many of the states of our Union.

§ 246. **Termination.**—So long as both tenants live, except, of course, by their joint conveyance, there is no method of terminating this estate unless it be, as generally held, that an absolute divorce will produce that result.<sup>4</sup>

<sup>1</sup>1 Preston on Estates, 131.

<sup>4</sup>Harrer v. Wallner, 80 Ill. 197.

<sup>2</sup>2 Blk. Com. 182, n.

*Contra*, Lewis' Appeal, 85 Mich. 340.

<sup>3</sup>Clark v. Clark, 56 N. H. 105;

Cooper v. Cooper, 76 Ill. 57.

## CHAPTER X.

### ESTATES UPON CONDITION.

- § 247. Nature of such estates.
- 248. Their classification.
- 249. Conditions precedent and subsequent.
- 250. The distinguishing feature.
- 251. Conditions in deeds and at law.
- 252. Continued.
- 253. Importance of this distinction.
- 254. Words to be used.
- 255. Effect of intent.
- 256. Further distinguishing features.
- 257. Rules for limitation.
- 258. What may be a condition.
- 259. Examples of void conditions.
- 260. Continued.
- 261. Rules applicable to construction.
- 262. Summary.

§ 247. **Nature of such estates.**—It was shown in a former chapter that the addition of the word “simple” to the word “fee” indicates a pure or unqualified estate in fee, as distinguished from a base, qualified or restricted one. So it is to be observed that, within certain well defined limits, not only estates in fee, but other estates as well, may be created with conditions appended, upon the performance or breach of which the estate so created will depend for its existence.<sup>1</sup>

§ 248. **Their classification.**—According to Blackstone, estates upon condition are of two kinds, viz.: upon condition implied and upon condition expressed. With the former we shall not especially concern ourselves, as they probably have little or no place in our law. Estates upon condition expressed, however, are very generally in use with us, and arise when an estate is granted with an express qualification an-

<sup>1</sup> Co. Litt. 201a.





nexed, whereby the estate granted shall either commence, be enlarged or be defeated upon performance or breach of such qualification.<sup>1</sup>

§ 249. **Conditions precedent and subsequent.**—The conditions or qualifications so annexed to estates regarded in point of time when they become operative, are either *precedent*, when they must happen or be performed before the estate can vest or be enlarged; or *subsequent*, when by the failure or non-performance of which an estate already vested may be defeated.<sup>2</sup> Thus if an estate for life be limited to A. upon his marriage with B., the marriage is a precedent condition, and until that event happens no estate is vested in A. But if A. grants an estate in fee, reserving to himself and his heirs a certain rent, and conditioned that if such rent be not paid at the time limited it shall be lawful for him and his heirs to re-enter and avoid the estate, in this case the grantee and his heirs have an estate upon condition subsequent, which will come to an end if the condition be not strictly performed.

§ 250. **The distinguishing feature.**—Conditional estates, or estates upon condition, can hardly be said to constitute a separate or distinct classification, being rather modifications of the other estates at law. But of this nature are all base, qualified or conditional fees spoken of at the outset of this chapter; and if there be a breach of any condition subsequent, the estate vested theretofore in the grantee will in every instance become determinable, and this is the distinguishing feature of estates on condition subsequent.

§ 251. **Conditions in deeds and at law.**—A further distinction must, however, be made between a *condition in deed*<sup>3</sup> and a *condition in law*, or, as it is now generally called, a *limitation*. For where an estate is created, and annexed thereto is a condition in deed, a failure or breach will not of itself put an end to the estate; there must be in addi-

<sup>1</sup> Blk. Com. 152 *et seq.*; Greenl. ton v. Preston, 1 Doug. 689; 2 Wash. Cruise, Dig., title XIII, sec. 3. on Real Prop. 23.

<sup>2</sup> See the leading case of King- <sup>3</sup> Litt., sec. 325; 1 Inst. 233b.

tion thereto some affirmative act, as, for instance, demand for possession or entry, by those entitled to the estate after breach. In other words, the estate on failure of the condition becomes defeasible at the instance of him who has the right to declare the forfeiture.<sup>1</sup>

§ 252. **Continued.**— But when an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, it is termed a limitation, and in such case the estate determines as soon as the contingency happens, and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy.<sup>2</sup>

§ 253. **Importance of this distinction.**— As the student may well conclude, it is oftentimes a matter of great difficulty, as it always is of great importance, to determine whether a given phrase creates an estate upon condition (that is, a condition in deed), or a conditional limitation (a condition in law). For it is to be said that no set form of words by which we can readily determine the one from the other is necessarily employed in the creation of either; and especially in wills terms are frequently made use of which in themselves convey no definite legal impression.<sup>3</sup>

§ 254. **Words to be used.**— For our guidance in creating estates of this nature, it may, however, be said that in a conditional estate the words “provided,” “so that,” and “upon condition,” especially when followed by a provision for re-entry in case of breach, are generally to be used. And that if a conditional limitation is desired, the terms “so long as,” “while,” “during” and “until” are words indicative of such a limitation.

§ 255. **Effect of intent.**— But it should be borne in mind that the intent of these words and terms is not inflexible,

<sup>1</sup> Talman v. Snow, 35 Me. 342; Prop. 23-26; Proprietors, etc. v. Vail v. L. I. Ry. Co., 106 N. Y. 283. Grant, 3 Gray, 142.

<sup>2</sup> 2 Blk. Com. 155; 2 Wash. Real <sup>3</sup> 1 Preston on Estates, 129; Owen v. Fields, 102 Mass. 105.

and hence it may be of further assistance to us to know that conditional estates may depend upon either precedent or subsequent conditions, while conditional limitations have to do only with conditions subsequent. That the former, *i. e.*, a conditional estate, by its operation may create, enlarge or terminate an estate, while the effect of the latter, the limitation, is always to destroy one.<sup>1</sup>

§ 256. **Further distinguishing features.**—Perhaps the best general rule can be derived from considering the great distinction between these two estates when created. The estate on condition has attached to it something that must be done to cause it to vest or to prevent it from being divested, or that must be left undone on peril of its destruction, upon the breach of which condition the estate becomes voidable, and the grantor or his heirs may destroy it by entry or some other positive act. The estate on a conditional limitation, on the other hand, has a fixed period, fixed by the happening of an event, beyond which it cannot continue; the instant the event happens the estate is at an end, and the right of the tenant is absolutely and finally gone without any further act on the part of any one. From this consideration may then be derived the general rule that whenever the intent of a deed or a will in attaching a condition to a gift or devise of land is to compel or to prevent the performance of a certain act, then the instrument should be construed as creating an estate on condition; but when the intent is to fix certain bounds to the length of existence of an estate, then the instrument should be construed as making a conditional limitation.<sup>2</sup>

§ 257. **Rules for limitation.**—In limiting estates of this character care should be taken that the express conditions incorporated therein be not *impossible*; for if they be at the time of the creation, or afterwards become so by the act of God, or of the grantor himself, or if they be contrary to law or repugnant to the nature of the estate, the estate will

<sup>1</sup>See Watkins on Conveyancing, 204.

<sup>2</sup>Shars. & B. Lead. Cases, 186.

be divested of the conditions; that is to say, if the condition be *precedent* and of the nature of those just above outlined, the grantee will take nothing, for the estate will never vest. If it be *subsequent* and the estate be thus already vested, the condition will fail and the estate become absolute in the tenant.<sup>1</sup>

§ 258. **What may be a condition.**—A condition may be made of almost anything that is not illegal or unreasonable, on the principle that the owner of the land, who is not obliged to transfer it at all, may attach to its transfer such conditions and restrictions as he pleases and in view of which the grantee takes the land, so long as they are not in contravention of any policy of law. Notwithstanding the great liberty thus allowed, there are, however, some conditions and restrictions which the law prohibits as being contrary to public policy or as being repugnant to the estate granted.<sup>2</sup>

§ 259. **Examples of void conditions.**—So a condition in general restraint of marriage is bad as against public policy, and is incapable of enforcement. But a condition that a person shall not marry before attaining a certain age, provided the age fixed be not an unreasonable one, is a good condition.<sup>3</sup>

§ 260. **Continued.**—Conditions in general restraint of alienation are void both as contrary to the policy of the law in this country and as repugnant to the estate granted. But conditions imposing partial restraints upon alienation have been generally upheld so long as their provisions be not unreasonable. Thus, conditions restraining alienation to particular persons, or for a reasonable length of time, have been sustained.<sup>4</sup>

§ 261. **Rules applicable to construction.**—It is an old principle that the law does not favor a forfeiture; and hence in construing a grant or devise, which, if held to be a limita-

<sup>1</sup> United States v. Arredondo, 6 Pet. 691; Hughes v. Edwards, 9 Wheat. 489.

<sup>2</sup> Shars. & B. Lead. Cases, 128.

<sup>3</sup> Shackelford v. Hall, 19 Ill. 212.

<sup>4</sup> Cornelius v. Ivins, 2 Dutch. 376.

tion or even a condition, would destroy the estate, the court will if possible construe the same to be either a covenant or a reservation and thus avoid the forfeiture. It is also to be remarked in this connection that the general rules of construction applicable to deeds and to wills obtains with regard to estates upon condition.

§ 262. **Summary.**—Finally, an estate granted on condition, until it is forfeited for a breach thereof, differs in no respect from an estate absolute of the same extent, and may be used and enjoyed in precisely the same manner, except so far as the condition itself expressly curtails the free use and enjoyment of the land.<sup>1</sup>

<sup>1</sup> As to who may take advantage be reserved to the feoffor, donor of a breach, the rule is that the or lessor and their heirs. Greenl. benefit of the condition can only Cruise, Dig., tit. 13, sec. 46.

## CHAPTER XI.

### FUTURE ESTATES AND INTERESTS.

- § 263. In general.
- 264. Possession and expectancy.
- 265. Reversions.
- 266. Definition and incidents.
- 267. How created.
- 268. How aliened.
- 269. Remainders in general.
- 270. Defined and explained.
- 271. Further incidents and peculiarities.
- 272. Rule against perpetuities.
- 273. Illustrations.
- 274. Continued.
- 275. Meaning of the rule.
- 276. Nature of all remainders.
- 277. Further of their nature.
- 278. May be created either by will or by deed.

§ 263. In general.— Another peculiarity of estates which must of necessity engage the attention of the student is that they may be so created that the right to, or the enjoyment thereof, or both, is postponed to some future time. In certain of such estates the *right* to have the same in full at some future day is a present one, or, as it is called, *vested*; in others, both the right to the estate and the right of enjoyment thereof are postponed to the future. Indeed, we shall subsequently find that certain estates and interests of this nature are so indefinite from a legal (as *opposed* to an *equitable*) standpoint that they are not recognized in courts of law; but concerning these we shall postpone our inquiry until we take up the subject of Equitable Estates, and for the present shall consider only the *legal* estates and interests of this nature.<sup>1</sup>

<sup>1</sup>For a full examination of the subject of future estates at law, the student is referred to Greenl. Cruise Digest, Feàrne on Contin- gent Remainders, Blackstone's Commentaries, and Kent's Commentaries, vol. IV.

§ 264. **Possession and expectancy.**—The principles announced in the opening of the preceding section give rise to that important branch of real-property law known as future estates and interests. With reference to the time of their enjoyment, estates may be either in possession or in expectancy; and of estates in expectancy there are two sorts: one created by act of law, called a reversion, the other by the act of the parties and called a remainder.<sup>1</sup> As such estates differ materially in their characteristics and incidents, no attempt will be made to formulate any general definition applicable to all of them, but we will take up the consideration of each, and, by determining what are its component parts, be thus enabled to distinguish it from others of its class as well as from limitations of a different nature.

§ 265. **Reversions.**—And first of reversions.<sup>2</sup> If I have an estate in fee in lands and grant to another an estate for life thereout, making no other or further disposition of my estate, it is apparent that I still have an interest in the lands by virtue of which, upon the death of the life tenant, if I survive him, the estate in fee will again become vested in me, or, if I die during the running of the life estate, then in my heirs. Now because I have thus parted with the seisin to my grantee for his life, and at his death it comes back or *reverts* to me, or to my heirs, as the case may be, the estate or interest possessed by me during the life-time of my said grantee is known in law as a reversion.<sup>3</sup>

§ 266. **Definition and incidents.**—A reversion, then, is a future estate or interest arising where one having an estate conveys away a portion thereof and makes no disposition of the residue. Strictly the estate so granted should be a freehold, for it is the seisin which reverts; and if one having a fee in lands demises them to another for a term of years, the seisin never goes out of the owner of the principal estate, and so cannot be said to come back to him, or *revert*, at the

<sup>1</sup> 2 Blk. Com. 163.

<sup>3</sup> Digby, Hist. Real Prop., ch. V,

<sup>2</sup> 2 Poll. & Mait. Hist. Eng. Law, sec. 3.

end of the term.<sup>1</sup> But it is general usage to speak of a reversion as existing when the present estate is one for years.

§ 267. **How created.**—Again, a reversion requires no special grant for its creation, but it exists by operation of law as an incident to every gift or devise of the nature above outlined; therefore, as Blackstone has it, a reversion is a future estate created by operation of law.<sup>2</sup>

§ 268. **How aliened.**—This reversionary interest is for most purposes deemed in law to be an estate, and so may be aliened by deed or devised under a will in the same manner as may other estates.<sup>3</sup> And so also may the interest of the reversioner be taken in execution and sold to satisfy the claims of his creditors. Furthermore, the interest of the reversioner may be terminated by his executing a *release* thereof to the person having the present estate.

§ 269. **Of remainders in general.**—Where one having an estate in fee grants thereout an estate of freehold less in quantity than that which he has to a certain person or persons to be presently held and enjoyed by them, and by the same gift or conveyance limits the residue of his estate to some other certain person or persons who are to take their estate when the former comes to an end, the interest of such last-mentioned person or persons is said in law to be an estate in remainder.<sup>4</sup> For example, if A., tenant in fee, makes gift to B. for life, and by the same instrument limits the fee to C. and his heirs, then B. takes a present estate for life, and C. the estate in fee expectant upon, that is awaiting, the death of B. The seisin passes at once from A. to B., in whom it remains until the death of B., who, in the meantime, is entitled to all the benefits and enjoyment of his estate for life. But immediately upon the decease of B. the seisin passes to C., who thereupon has the estate in fee simple, and so at once comes into all the benefits of such an estate.

<sup>1</sup> Leake, Land Law, 315.

<sup>2</sup> 2 Blk. Com. 163.

<sup>3</sup> Washb. Real Prop. 738.

<sup>4</sup> 4 Kent's Com. 197; 2 Washb. Real Prop. 539.



§ 270. **Defined and explained.**— The life estate of B., in the example given, is a present estate both in point of right and of enjoyment, while that of C. is present in right only, the right of enjoyment thereof being in expectancy, that is in the future, and hence a future estate. The estate of B. is called the *particular* estate, from the Latin *particula*, which signifies a part or portion; while in the example given the estate of C. is one in fee simple. It is further evident that A. has parted with his entire estate, and so has no possibility of reversion or any other interest therein; and it is accordingly held that in law a remainder cannot be limited upon or after a fee,<sup>1</sup> and that every legal remainder must have an estate of freehold to support it; that is, the particular estate must be one of freehold.<sup>2</sup>

§ 271. **Further incidents and peculiarities.**— Again, there may be several estates in remainder carved out of the principal estate, and they may be limited to different persons and created to extend over an indefinite duration of time, so long as the fee is finally to vest in some one, without violating what is known as the rule against perpetuities.

§ 272. **The rule against perpetuities.**— The restrictions placed upon free alienation by the feudal system were, as we have seen, gradually abolished, until it has long been the policy of the law not only to uphold and encourage the principle of free alienation, but also to prohibit the limiting of estates in such manner that it is impossible to freely dispose of the same. If no such prohibition were in force, it would be possible for one to create a series of particular estates with remainders over, which would prevent the fee from vesting in any person or persons for a period indefi-

<sup>1</sup> Loddington v. Kyrne, 1 Ld. Raym. 208.

<sup>2</sup> Blackstone treats limitations of a fee made after an estate for years as a vested remainder. Others think this open to criticism because the seisin is already in the

tenant in fee; nor can it be said that as a matter of law the enjoyment of tenant in fee is *in futuro* in that case, for he enjoys by tenant for years, who is *his* tenant. Of course there is no question when the remainder is a contingent one.

nite in duration, and thus tie up the power of alienation for an unlimited number of years.<sup>1</sup>

§ 273. *Illustration.*—For, if an estate for life be given to A., with remainder over to B. and his heirs, and B. is living and of lawful age, a good conveyance of the whole estate can be made by A. and B. joining in the deed, so that alienation is not thereby prevented. But in the same case if B. were not yet born, no alienation could be effected until B. had been born and had arrived at lawful age—usually twenty-one years; or had died during his infancy leaving competent heirs.

§ 274. *Continued.*—So, if a series or succession of such limitations were made, the power of alienation would be indefinitely suspended, and what in legal phrase is termed a *perpetuity* would result. In order to prevent so undesirable a consequence, the law has established what is known as the rule against perpetuities, by which it is laid down that no limitation shall be valid unless by the terms thereof the fee is to vest absolutely in some person or persons within a life or lives in being and twenty-one years thereafter.<sup>2</sup>

§ 275. *Meaning of the rule.*—Thus it will be seen that an estate may be limited to any number of *living* persons for their lives, with remainder over in fee, to vest absolutely in some person or persons within twenty-one years after the death of the last surviving tenant for life. But that if such life tenants were not in being at the time of the taking effect of such limitation, the fee would not necessarily vest within the life or lives of a living person or persons and twenty-one years thereafter, and the limitation would be void. Hence, in limiting estates of this nature, care must be taken that they do not violate this important rule and so lose their force and effect.<sup>3</sup>

<sup>1</sup> Leake, *Land Law*, 439-442; Will. limitation void. See 1 Jarman on R. P. (17th ed.) 476; Gray, *Perpetuities*, sec. 200. Wills, 229.

<sup>2</sup> Harg. *Law Tracts*, 518. This rule is generally in force throughout the United States. The effect of its violation is to render the rule against perpetuities has especial application to limitations by way of executory devise. See ch. XIV, *infra*.

§ 276. **Nature of all remainders.**—It is further to be understood that *at law* no estate of freehold can be created to commence *in futuro*,<sup>1</sup> that is, at some time in the future, but that every such estate must *vest immediately* either in possession or in remainder, for no estate at law could formerly be conveyed without livery of seisin, which of necessity operated at once or not at all. But in limiting a remainder, the livery in contemplation of law is made to the tenant of the particular estate, from whom it passes on the termination thereof, by virtue of the original gift, to him who was therein named to take the remainder; and so the remainder is said to be *supported* by the particular estate, and that no remainder can be created without a particular estate to support it.<sup>2</sup>

§ 277. **Further of their nature.**—Again, and as a consequence of the rule announced in the foregoing section, the remainder must commence or pass out of the grantor at the time of the creation of the principal estate. Also, that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* upon its determination; for if it were not so limited there would be a space of time during which the seisin would be without an owner, and this the law will not tolerate, no matter how brief such period may be.<sup>3</sup>

§ 278. **May be created either by will or by deed — Kinds.** Estates in remainder may be created either by will or by deed, and are of two sorts: *vested* or *executed*, and *contingent* or *executory*.<sup>4</sup> We shall consider them in their order. If gift be made to A. for life, and then to B., a living person, and his heirs, the interest taken by B. is called a vested remainder, for the reason that whenever after its creation A. dies, B. or the heirs of B. are in being and ready to take the estate limited to be taken in remainder.<sup>5</sup>

<sup>1</sup> 1 Preston on Estates, 217; Will. R. P. 250.

<sup>3</sup> Co. Lit. 153b (Butler's note, 217).

<sup>4</sup> 2 Blk. Com. 168.

<sup>2</sup> The writer is unable to perceive the distinction sometimes made in this regard between a *vested* and a *contingent* remainder.

<sup>5</sup> Will. R. P. (17th ed.), title "Remainders."

## CHAPTER XII.

### REMAINDERS, VESTED AND CONTINGENT.

- § 279. Vested remainders.
- 280. Their alienation.
- 281. The rule in Shelly's case.
- 282. History of the rule.
- 283. Alienation restricted.
- 284. Its development.
- 285. Its complete establishment.
- 286. Reasoning upon which rule is founded.
- 287. Effect given to the rule.
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- 289. Results of its application.
- 290. Its standing in the modern law.
- 291. Contingent remainders.
- 292. Nature of contingency.
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- 296. Necessity of freehold to support.
- 297. Must vest when.
- 298. Nature of contingency.
- 298. Illegal event.
- 300. Example.
- 301. Mode of alienation.
- 302. Illustrations.
- 303. Merger.
- 304. Further illustrations.
- 305. Interposition of estate to trustees.

§ 279. Vested remainders.—We then have a vested remainder in every case where from the time of its creation there is always some definitely ascertained person or class of persons ready to take the remainder whenever the particular estate for any reason comes to an end. By a vested remainder a present interest passes to the party, though such interest is to be enjoyed in the future. The estate is

invariably fixed to remain to a determinate person or class of persons after the particular estate is spent, and for this reason remainders of this sort are known also as *executed*, and being executed nothing can defeat them or set them aside.<sup>1</sup>

§ 280. **Their alienation.**—Vested remainders do not render the land inalienable. The tenant of the particular estate may make conveyance thereof to a stranger, the remainderman may make gift of his interest to another, and by joining in a deed such tenant and remainderman have power to pass the entire estate to their grantee.

§ 281. **The rule in Shelly's case.**—Before taking up the subject of contingent remainders we shall spend a little time in the consideration of that famous rule of law known as The Rule in Shelly's Case. This rule takes its name from a case decided in England in the year 1579,<sup>2</sup> though it is apparent from a reading of that case that the rule was by no means a new one at that date, nor first announced in the case from which it received its name.

§ 282. **History of the rule.**—For an explanation of this rule of law we must go back to feudal times and feudal principles. When, under that system of land holding, lands were given to a person and his heirs, such person did not take an estate in fee simple as we now understand it, for the words of the gift were literally construed, and to entitle the donee to an estate for only so long as he himself could enjoy it, that is, for his life; at his death it passed in every instance to his heirs, nor could he otherwise direct it, either by deed during his life-time or by will at his death.<sup>3</sup> The heirs had a vested interest in the lands, which was theirs by virtue of the gift to their ancestor, and so existed during his life-time.<sup>4</sup>

<sup>1</sup> Green. Cruise, Dig., tit. 16, sec. 8; Will. R. P., tit. "Remainders." The definition here given, it is believed, will afford a perfect test for distinguishing vested from contingent remainders, in every instance.

<sup>2</sup> Shelly's Case, 1 Co. Rep. 104a.

<sup>3</sup> See *ante*, chapter on Tenures and Estates, herein.

<sup>4</sup> Will. R. P. (17th ed.) 398.

§ 283. **Alienation restricted.**—Now this was in accord with the principles of the feudal system, which placed restrictions on the power of free alienation, for since the ancestor had not the entire estate he could not alien it as such; and since a living person has no heirs, there were no persons who by joining in a deed could convey good title to the entire interest as expressed by the terms of the gift, and this was precisely the result desired by the promulgators of the feudal system.

§ 284. **Its development.**—But as we have seen, the feudal system was hardly well established before efforts began to be made to evade and avoid its effects. The desire for the power of free alienation waxed stronger as time went on and land became more valuable and of more varied uses. It is well known that the opinions of the courts on great questions, as well as the general trend and policy of the law, ever reflect the desires of the people at large; and hence when the tide set so strongly toward free alienation, we find courts and law makers lending their assistance.

§ 285. **Its complete establishment.**—It was not possible for the courts to change the forms or wording of these old gifts, or to direct that different phraseology should be made use of in creating the new ones, but there was vested in the judges the power to *construe*, that is to declare the legal purport of, the words made use of in such instruments of conveyance, and this they proceeded to do.

§ 286. **The reasoning upon which it is founded.**—The student will bear in mind that anciently the heir took by reason of the conveyance originally made to his ancestor, not by descent from his ancestor; in other words, he was a *purchaser*; and the words “the heirs,” “his heirs,” or “heirs,” were words of purchase.<sup>1</sup> It was upon these words that the courts placed a new construction, for they declared that these words should, as a matter of law, be regarded as words made use of to indicate what sort of an estate the ancestor should take under the gift; that is, words of limitation making out

<sup>1</sup> Will. R. P. (17th ed.) 398 *et seq.*

the estate of the ancestor, not as words of purchase conferring an interest upon the heir;<sup>1</sup> and that when the heir took the estate, if at all, he should take the same, not by purchase, but by descent from his ancestor. Furthermore, that inasmuch as the word "heirs" had always been connected with and made use of to denote a fee (either simple or in tail), such words should still have the same signification when thus used in gifts or conveyances, and that the ancestor should take a fee-simple estate.

§ 287. **Effect given to the rule.**—When the ancestor took the fee under these circumstances he was able to alien the same in full either by will or by deed, and thus did the courts, by the establishment of the rule in Shelly's case, lend their aid to the advancement of the cause of free alienation. This rule of law, aided by certain enactments of parliament, and other decisions of the courts announced at or about the same time, did much to secure for the people the inestimable benefits of free alienation.

§ 288. **The rule stated.**—Stated concisely and with legal accuracy the rule is as follows: When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, the words "his heirs" or "heirs of his body" are words of limitation and not of purchase, and the ancestor takes a fee.<sup>2</sup> Thus, if gift be made to A. for life, and at his death then to his heirs, the interest of A. is not a life estate with remainder over to his heirs, but is an estate in fee. In the example given, the succeeding estate is limited *immediately* to the heirs, but the same consequences would follow had there been an estate therein limited *between* that of A. and his heirs (mediately to his heirs), as, for instance, gift to A. for life, then to B. for life, then to the heirs of A.

§ 289. **Results of its application.**—The application of this rule has, especially in the case of wills, very frequently defeated the intention of the donor or testator, and has

<sup>1</sup> 1 Co. Rep. 104a (Shelly's Case).      <sup>2</sup> Will. R. P. 253.

therefore been sharply criticised. Indeed to such an extent has the opposition thereto been carried, that in many jurisdictions the rule has been abolished by statute and greatly so restricted in others. But it is still in full force and effect as a rule of property established by the common law, both as to deeds and to wills, in some of the states of the Union.<sup>1</sup>

§ 290. *Its standing in modern law.*—It is argued by some, that, the rule having accomplished its object in assisting free alienation, now remains merely as a relic of the barbarity of feudal times and a stumbling block to the advanced and enlightened policy of our modern laws, and hence should yield in every instance to the plain intent of grantor or testator.<sup>2</sup> Others are of the opinion that the rule is one of propriety if not necessity, and that from the very fact of its technicality it tends to preserve that order and observance of precedent so essential to the maintenance of our law as a complete and perfect system. That the desire of the donor, if so strong as to override the plain rules of the law, ought to be of sufficient moment to compel him to see to its proper expression in the instrument of conveyance; for, as has been well said, “A donor is no more competent to make tenancy for life a source of inheritable succession than he is competent to create a perpetuity or a new canon of descent. The rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligament of property.”<sup>3</sup> But be this as it may, enough has been said to inform the student of the existence of the rule, and to enable him to gain some understanding thereof, and thus to guard against the difficulties so frequently arising through ignorance of its existence and provisions.<sup>4</sup>

<sup>1</sup> See Hutchins' note, Will. R. P. (17th ed.), 407.

<sup>2</sup> Sieloff v. Redmond's Adm'r, 26 Ind. 251.

<sup>3</sup> Hileman v. Bonslaugh, 13 Pa. St. 344.

<sup>4</sup> From among the several explanations of the origin of the Rule

in Shelly's Case to be found in the books, the writer has thought best to select the one herein given, for the reason that in his judgment it is the one most easy of comprehension on the part of the student, and consequently of greatest assistance to him. It is believed,



§ 291. **Contingent remainders.**—We are next to learn that estates may be limited not only to commence *in possession* in the future, as in the case of vested remainders, but that they may be so limited as to commence *in interest* also at some time in the future; and when so limited such estates at law are called contingent remainders, for the reason that, as the name indicates, the vesting of the interest, being fixed for a time in the future, is therefore uncertain or contingent, and hence is made to depend upon some event of an uncertain nature.

§ 292. **Nature of the contingency.**—The contingency upon which the estate depends for its vesting may be either with regard to the happening or not happening of some given event which is not certain to happen or not to happen within the time stated, or it may relate to some person or class of persons who may or may not come into or remain in existence, so that the limitation can become effective.<sup>1</sup> Thus, if gift be made to A. for life, with remainder to the heirs of B., a living person, we have a contingent remainder; for, in the event that B. survive A., the heirs of B. take nothing and the limitation over to them would be void, because, since a living person can have no heirs, there would be no one to take the estate upon the death of A. In such case the fee would revert to A.'s donor. Here the contingency is found in the uncertainty of the comparative duration of the lives of A. and B.<sup>2</sup>

§ 293. **Uncertain person.**—Again, if gift be made to B. for life with remainder to such of the children of A. and B. (husband and wife) as shall be living at the death of B., we have an instance of the form of contingent remainder secondly mentioned above, for in this example the contingency or uncertainty has reference to the person or class of per-

however, that the explanation as given is correct in all essential particulars.

<sup>1</sup> 2 Blk. Com. 168; Fearne, Cont. Rem. 216; 4 Kent's Com. 202.

<sup>2</sup> Fearne, Cont. Rem. 9. The order of the classes of contingent remainders as stated by Mr. Fearne

is not here observed.

sons who are to take; and inasmuch as it cannot be presently determined which or how many of such children will survive B., the limitation is contingent because made to an uncertain or unascertained person or class of persons.<sup>1</sup>

§ 294. **Definition.**— A contingent remainder is therefore defined to be a future estate or interest at law limited to vest both in interest and in possession upon the happening or not happening of some dubious or uncertain event, or to some unascertained person or class of persons.<sup>2</sup> Contingent can be distinguished from vested remainders in every case by the fact that the former are *not* ready from their commencement to their end to come into possession at any moment when the prior or supporting estates (the particular estates) may happen to determine.<sup>3</sup> To illustrate from one of the examples given above — gift to A. for life, then to the heirs of B. (a living person). If B. survive A. there is no one to take under the limitation, hence the remainder is not ready at any time to come into possession upon the determination of the prior estate and is therefore contingent and not vested.

§ 295. **Origin and incidents.**— The early common law did not recognize this class of future estates, and it was not until the time of Henry VI. that contingent remainders became known as legal estates.<sup>4</sup> As a matter of course they restricted and generally prevented alienation; and even at the present day they confer no actual estate, but rather an interest or possibility upon their possessors.<sup>5</sup> From the fact that they are bound to vest, if at all, during the running of the particular estate or instantly upon its termination, estates of this sort are constantly subject to destruction by the failing

<sup>1</sup> Fearne, Cont. Rem. 8; 2 Washb. Real Prop. 565.

<sup>2</sup> 2 Blk. Com. 168.

<sup>3</sup> Mr. Fearne says: "The present capacity of taking effect in possession, if the possession were now to become vacant, . . . universally distinguishes a vested remainder

from one that is contingent." Fearne, 216. See also Allen v. Mayfield, 20 Ind. 293; Brown v. Lawrence, 3 Cush. 390; Will. R. P. 252.

<sup>4</sup> 2 Washb. R. P. 560; Will. R. P. 263.

<sup>5</sup> 2 Washb. R. P. 562; 1 Preston on Estates, 75.

of the particular estate prior to the happening of the event on which the remainder is limited.<sup>1</sup>

§ 296. **Necessity of freehold to support.**—The reason for this rule is found in the legal principle that the seisin in an estate must never be without an owner. The ancient law regarded the matter of the transfer of lands as necessarily notorious, and if the grantor did not at once part with the seisin it remained with him. Hence the conveyance of a freehold made *to-day* to take effect *to-morrow* would be void because there would be an interval of time during which the seisin would be without an owner.<sup>2</sup> So if on any conveyance possession were given, where the estate conveyed were less than a fee simple, the instant such estate determined seisin would again be in the grantor. For example, if gift be made to A. for life, and after his decease *and one day*, then to B. and his heirs, the instant A. dies the seisin reverts to the grantor and the limitation to B. is void.

§ 297. **Must vest when.**—We thus observe that every contingent remainder must vest or become an actual estate during the continuance of the particular estate which supports it, or the instant that such particular estate determines. Thus a gift to A. for life, and at his decease to such son of his as shall first attain the age of twenty-four years, is a good contingent remainder, because the seisin is not necessarily left without an owner after A.'s decease. If, therefore, at his death A. should have a son twenty-four years of age or older, such son will at once take the seisin by reason of the estate in remainder, which vested in him the moment he attained that age. In the case just given, the contingent remainder became vested during the continuance of the particular estate.

§ 298. **Nature of contingency.**—But if there should be no son, or if the son should not have attained the age of

<sup>1</sup> 2 Washb. R. P. 589.

The effect of this rule has in some states been abolished by statute.

<sup>2</sup> This disability is avoided in that class of future estates known as executory interests, to be treated of hereafter.

twenty-four years, the remainder will fail altogether and the seisin will revert to the original grantor. Somewhat after the manner of the usual present estates upon condition, the contingency or condition upon which remainders may be limited is either *precedent* or *subsequent*. If precedent, the remainder cannot vest until that which is contingent has happened. If subsequent, the estate vests immediately, subject always to be defeated by the happening of the contingency or condition, and is a vested remainder.

§ 299. **Illegal event.**—A contingent remainder cannot be made to vest on any event which is illegal or contrary to good morals or public policy. As, for instance, no such remainder can be given to a child who may be hereafter born out of lawful wedlock. It was formerly considered, and so laid down by Lord Coke, that the event on which a remainder is to depend must be one of common possibility and not a remote one, or a double, or a possibility upon a possibility. But this rule Mr. Williams disputes,<sup>1</sup> and declares on the authority of Lord St. Leonards that it is abolished. At any rate, the rule is one of logic rather than of law or good sense and has never found favor in the United States.

§ 300. **Example.**—To further illustrate the great diversity of form which may be assumed in the limiting of remainders of the class under consideration, the following is given as an example of such an estate wherein the expectant owner of the remainder is a living person and was so at the date of the creation of his interest: Gift to A. for his life, and if C. be living at his death, then to B. and his heirs. The estate of B. is not vested, but is a future estate not to begin either in interest or possession until the decease of A. It is not always ready to come into possession whenever the estate to A. may end, for if A. should die subsequently to C., B. takes nothing, though plainly he has a chance of obtaining an estate should C. survive A.

§ 301. **Modes of alienation.**—A contingent remainder could not at common law be conveyed by deed.<sup>2</sup> It was re-

<sup>1</sup> Will. R. P. (17th Int. ed.), p. 240;  
<sup>2</sup> Washb. on Real Prop. 580.

<sup>2</sup> Such estates are now generally made alienable by deed, but are not

garded as merely a possibility, and stood in the same position in this regard as did a condition for re-entry. It might, however, have been released;<sup>1</sup> that is to say, in the examples above given, B. might by deed have given up his interest to A. In other words, B. might surrender his interest in the lands to one already possessed of an estate therein, but could convey no interest or estate to a stranger. Contingent remainders are devisable by will, and generally assignable in equity but not at law, and so they are not commonly subject to be taken in satisfaction of legal process against their owners.

§ 302. **Further illustration.**—As we have seen above, a contingent remainder was always liable to destruction by the untimely termination of the particular estate; and, as has already been observed, the reason for this seems to be that, if the particular estate was determined, the freehold would remain undisposed of until the future estate vested at some time thereafter, and that this the law does not sanction. Thus, suppose a gift to A., a bachelor, for his life, after his death to his eldest son and the heirs of his body, and in default of such issue, then to B. and his heirs. In this instance A. has a vested estate for life in possession. There is further a contingent remainder in tail to his eldest son at his birth, with remainder over again to B. in fee. If now, before A. had any son, the particular estate for any reason came to an end,<sup>2</sup> B.'s estate would have become a fee simple in possession, and the son of A., if he had one thereafter, would take nothing, and the ending of the life estate of A. would have destroyed the contingent remainder by letting into possession the subsequent estate of B., of which he could not then have been divested. Much has been said along this line that the student may understand the necessity that existed for some method of effectually preventing the failing and

generally capable of being taken on execution. 1 Preston on Estates, 76; *Loving v. Elliott*, 16 Gray, 574; 2 Cruise, Dig. 333.

<sup>1</sup> Tied. Real Prop., sec. 412.

<sup>2</sup> As, for instance, by forfeiture.

destruction of contingent remainders, and thus adding to their utility in the law.

§ 303. **Merger.**— Again, it is a principle of law that whenever a greater and a less estate coincide and meet in one and the same person, without any intermediate estate, the less estate is said to be merged in the greater and thus comes to an end.<sup>1</sup> So in the example last above given, should A. have purchased B.'s remainder in fee and gone into possession of the entire estate before he had any son born, the contingent remainder to such son would have been destroyed, for it could not have vested after the determination or subsequent to the remainder in fee simple; but this it could not do because a fee cannot have a remainder limited thereafter.

§ 304. **Illustrations — Continued.**— In the same manner a sale by A. to B. of his life estate before the birth of a son would have destroyed the son's contingent remainder, because it would have given to B. an uninterrupted estate in fee simple in possession, and the same effect would have been produced had A. and B. joined in a conveyance of their estates to a third person, prior to the birth of a son to A.<sup>2</sup>

§ 305. **Interposition of trustees.**— The disastrous consequences which would have resulted from the destruction of contingent remainders, as above set forth, were largely obviated in practice by interposing a vested estate between those of A. and B. The plan usually adopted to preserve these remainders and others of like nature was to create an estate in trustees,<sup>3</sup> sometimes for life, sometimes in fee, who would then take seisin upon the determination of the particular estate, and hold the same under their agreement of trust until the contingency upon which the remainder was to vest occurred.

<sup>1</sup> 2 Washb. Real Prop. 589.

<sup>2</sup> The failure of the remainder by reason of the termination of the particular estate by merger, disseisin, etc., has been provided

against by statute in many of the states.

<sup>3</sup> 2 Washb. on Real Prop.; 2 Blk. Com. 171; Fearne, Cont. Rem. 325. This method may still be pursued when necessary.

## PART II.

# ESTATES IN EQUITY.

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### CHAPTER XIII.

#### ESTATES AND INTERESTS IN EQUITY.

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§ 307. **Common law and equity distinguished.**—It was said in our introductory chapter that the term “common law” is made use of to indicate one branch or division of our system of jurisprudence. The other branch or division thereof is known as equity or chancery jurisprudence. An extended discussion of equity or chancery practice would be out of place here, and for such a discussion the student should consult the books upon that subject.<sup>1</sup> We shall, however, investigate this branch of the law to the extent deemed necessary to enable us to understand its application in the law of real property.

§ 308. **Importance of equitable principles.**—The study of equitable principles and jurisdiction is of great moment to the student of real-property law, for he will find that from the standpoint of the tribunal in which the rights of persons having estates or interests in land are determined, such estates or interests are of two sorts, legal and equitable.<sup>2</sup> The former are such estates as are recognized in courts of law alone, the latter such as are cognizable only in courts of equity. That is to say, one may have a technical legal estate, for instance, in fee, such as a court of law will protect and sustain, or he may have a right or interest of such a nature, enforceable only in a court of equity, that the same benefit will accrue to him as in the case of a legal estate.

§ 309. **Illustration.**—To illustrate, A. bargains with B. for certain lands and pays to him the purchase price agreed upon; B. executes to A. an instrument of conveyance purporting to be a deed, but fails to attach or affix a seal to his signature thereto. The result of the omission of the seal is that the *legal* title does not pass to A., and hence he would have no standing in a court of law. But equity would regard him as the owner of the property and would enforce his rights; for equity, so far as it has the power, will redress a wrong, irrespective of whether some rule of the common law has been transgressed or not.

<sup>1</sup> Story's Equity Jurisprudence,    <sup>2</sup> Washb. Real Prop. 384.  
or Bispham's Equity.



§ 310. **Origin of equity jurisprudence.**—Equity or chancery jurisprudence had its source in the ancient ecclesiastical law by which the earlier church of England was governed, and hence dates back to the days of the Romans, from whom were obtained those precepts and principles which form its foundation.<sup>1</sup> The church of Rome brought with it into England this system of ecclesiastical laws upon its establishment there, and years before equity jurisprudence arose, had its tribunals for the trial and punishment of those who were accused and found guilty of having committed *moral wrongs*. But the church had no authority thus to act except with regard to its own members, nor had it power to enforce its decrees against them, except by or through the penalty of excommunication.

§ 311. **Defects of the common law.**—The advance of civilization, the progress of the arts, of commerce and of the English people generally, soon revealed serious defects in the common law, the chief among which was that it failed to provide a remedy in many instances where there was a clear violation of a moral right. Now it was a principle of the English law that the sovereign was the fountain-head of all justice, and hence it came about that persons feeling themselves aggrieved, and having in the particular case no redress at the common law, applied in person to the king by their bill or petition, who, upon an examination thereof, if he deemed the cause stated a good one, issued a subpoena<sup>2</sup> for the person or persons named as defendant or defendants in such bill or petition, commanding him or them to appear and answer the same, and thereafter proceeded according to the rules of ecclesiastical courts, that is without a jury or oral testimony and upon principles of morality, to grant to the suitor such relief or to afford him such remedy as seemed to him meet and proper.

§ 312. **Rise and development of equity.**—Such applications becoming, as they soon did, very numerous, were re-

<sup>1</sup> 1 Spence, Eq. Jur. 436.

<sup>2</sup> Greenl. Cruise, Dig., title Use, p. 333, sec. 13.

ferred by the king to his privy counselors under the supervision of the chaucellor,<sup>1</sup> and hence we have the name Chancery Practice, which is synonymous in its use here with Equity Jurisprudence. The rules and precedents established and followed by these courts rapidly grew into a separate and distinct system, which was and still is looked upon as an independent and complete method of administering justice wholly apart from that pursued by the common law.

§ 313. **The application to landed property.**—Now it was not long after the establishment of this equity jurisprudence that persons having estates in or claims upon landed property began to realize that a new power had been placed in their hands, and to use the same to accomplish many desired objects which the common law afforded them no means of attaining. As an instance of the exercise of this power we may note the following: The student will remember that in the earlier centuries of the feudal system, a will of lands, if made, was void and of no effect, and that this continued to be the law for many years after the power of alienation *inter vivos* was recognized. But upon the full establishment of equitable doctrines it became possible for the person owning the lands to convey them to another, to be by him holden for the use and benefit of such person or persons as the grantor should thereafter designate. Then by leaving at his death proper instructions as to whom such use and benefit should accrue, the owner of the lands became capable of exercising substantially all the powers and gaining practically all the advantages to be obtained by actual competency to dispose of his lands by a last will and testament.

§ 314. **How equity enforced a use.**—For in such a case the courts of equity would compel the person to whom the “conveyance to use,” as it was called, was made, to carry out the intention of the grantor as expressed in the directions or instructions by him given.<sup>2</sup> In this and in many other ways did the effect of these decrees or orders in the

<sup>1</sup> Bracton's Law Tracts, 818.

<sup>2</sup> Cornish, Uses, 12.

courts of equity interfere with, hamper and defeat the strict rules of the common law.

§ 315. **Conflict between church and state.**—But more than all this in its effect was the conflict so long maintained for supremacy between the ecclesiastics and the barons—the church and the state. At this period landed property was practically all that was considered of value and consequence in England. Hence it was the constant aim of each party to acquire real property for itself and to prevent the ownership thereof by its opponent.<sup>1</sup> Owing to the peculiar constitution of the Church of Rome, real property in a general sense could be held only by those bodies or creatures of the church embraced under the name of ecclesiastical corporations. The growing power and wealth in landed property of these church corporations alarmed the leaders of the state party, who, it must be borne in mind, at that time constituted the parliament, and thereupon they sought to cripple the resources of the adherents of the church by enacting what is known as the Statutes of Mortmain, which provided, in effect, that no ecclesiastical corporation could take title to lands either by deed or by will, or by any form of gift or conveyance whatsoever.

§ 316. **Uses employed to evade the statute of mortmain.** But hardly had this measure been incorporated in the law when the ecclesiastics found a means of evading it by a “conveyance to uses,” as above explained. And so it was accordingly held that where a gift was made to A. for the use and benefit of B., and B. was an ecclesiastical corporation and A. an individual, the latter should take and hold the legal title, but that *in equity* B. was the owner of the property, and hence entitled to all the benefits thereof. And the courts of equity proceeded to enforce the rights of B. as against A.

§ 317. **The necessity of further legislation.**—The result of these proceedings on the part of the ecclesiastics had of necessity the practical effect of abrogating the operation of

the statutes of mortmain, and thus to put the state party again upon its mettle to devise further means for the accomplishment of its objects. It must have been apparent to the legal representatives of this party at that time, that, of necessity to the end sought, two results must be attained: first, the annihilation of the effect of a conveyance to uses; and second, the abolishment of the jurisdiction of courts of equity over landed property.

**§ 318. Passage of the statute of uses.**—With these ends in view, parliament, in the year 1535, passed the justly famous Statute of Uses,<sup>1</sup> than which, with the possible exception of the Habeas Corpus Act, no legislation has ever so profoundly, or for so long a time, stamped its impress upon the laws of the English people and their descendants.<sup>2</sup>

**§ 319. The provisions of this statute.**—The statute of uses contained several provisions, but we need notice only those which affect the subjects under consideration. Of those, the most important was that provision which declared that, whenever conveyance was made to one for the use of another, the person who was thereby to have the *beneficial* (that is the equitable) estate should, as a matter of law, have also the legal estate; that is to say, the statute *executed the use* in the person beneficially entitled. Thus, if gift were made to A. for use of B., A. took no estate whatever, while B. received both the equitable and legal title.<sup>3</sup>

**§ 320. The statute in operation — Its effect.**—The operation of the statute upon those conveyances to uses made to evade the statutes of mortmain will be at once apparent; for if gift were made to one for the use of an ecclesiastical corporation, the statute would at once pass the legal estate to such corporation; but it being unable to take a legal estate

<sup>1</sup> Statute 27 Henry VIII., ch. 10. Prop. 133; <sup>2</sup> Preston on Convey-

ances, 474.  
ards (Mr. Sugden). See further <sup>3</sup> Greenl. Cruise, Dig., title "Use,"  
upon this statute generally, Gil- 326, sec. 34; Smith, Real and Pers.  
bert on Uses, 74 *et seq.*; Will. Real Prop. 155; Witham v. Brooner, 63  
Ill. 344, and cases therein cited.

by reason of mortmain, the entire gift failed, and neither the one to whom the conveyance to use was made nor the *cestui que use* took any interest or estate whatever.

**§ 321. Result of the operation of this statute.**—Thus, temporarily, at least, did the promulgators of the statute thereby attain the objects by them sought. It would furthermore appear that during the period immediately preceding the passage of this statute the jurisdiction of courts of equity over landed property was exercised in those cases only where conveyance had been made upon some use, trust or confidence; and that consequently, when such conveyances became inoperative by the operation of the statute, the courts of equity were practically robbed of their jurisdiction over landed property.<sup>1</sup>

**§ 322. Methods adopted for evading the statute.**—But as the court of equity was distinctively the forum of the ecclesiastics, and as it had now come to pass that the people at large desired the continuance of that court in the full enjoyment of its former prerogatives, ways and means were soon found to evade the operation of the statute.<sup>2</sup> The point was made (among others) that the statute could operate in any given case but *once*, so that if a gift were made to A. for use of B. for use of C., B. would take the legal and C. the equitable estate;<sup>3</sup> and further, that where conveyance was made to uses, and there were in connection therewith circumstances which demanded that the grantee therein should retain the legal estate in order that he might properly perform his duties toward the *cestui que use*, the statute would not operate, and the conveyance would be undisturbed in its effect thereby.<sup>4</sup>

**§ 323. Limiting a use upon a use.**—The courts having sustained these and several other instances wherein it was

<sup>1</sup> Will. Real Prop. 133. But see Gilbert, Uses, 74, and Sanders, Uses, 86. <sup>3</sup> Greenl. Cruise, title Trust, ch. 1, secs. 4, 5, 6.

<sup>4</sup> Fearne, p. 422; Cruise, Dig. 387.

<sup>2</sup> 1 Rep. Eng. Com. Real Prop. 8; Gilbert, Introd., Uses, 63.

maintained that the statute could not operate under certain conditions, a class of cases arose wherein the courts of equity retained their jurisdiction, and from this source has sprung the complex system of equitable jurisprudence of to-day, so far as the same has reference specifically to landed estates. We are thus informed that uses or conveyances to use had their existence originally under three separate conditions: uses before the statute; uses under the statute, and uses after the statute; each being governed by its own specific rules, and exercising its own functions in the law.<sup>1</sup>

§ 324. *Of uses before the statute.*—And first, then, of uses before the statute. The common law originally admitted of no estate which had not the incidents of seisin and possession. But the inroads made by the doctrines of the courts of equity led to the creation and recognition of a sort of interest or estate in landed property wherein the legal estate was in one person, and the beneficial interest, *i. e.*, the right to the rents, issues and profits of the land, in another.<sup>2</sup> Such an interest was denominated *a use*, and was created in the manner following: The owner of the land conveyed it by feoffment with livery of seisin to some trusted friend, with an agreement in secret that the feoffee should hold the land to such uses as were then or should be thereafter decided upon by the grantor. The idea of a use, and the rules by which it was originally governed, were undoubtedly adapted from the civil law, where it had been originated for the assistance of certain persons who, under the Roman law, were incapable of taking as heirs.<sup>3</sup>

When uses were first incorporated into the English law the *cestui que use* was dependent entirely upon the good faith of him who was made feoffee to use, and as a matter of course many breaches of trust were committed in connection therewith. These evils growing constantly,

<sup>1</sup> This classification is logical and generally adopted. Law Tracts, 150; 2 Washb. Real Prop. 388.

<sup>2</sup> Tudor's Lead. Cas. 252; Bacon, <sup>3</sup> 2 Blk. Com. 328; 1 Brown, Civil Law, 304; Bacon, Law Tracts, 515.

and taken together with the fact that these secret conveyances tended to abrogate that notoriety of the transfer and ownership of landed property so jealously guarded by the law, as well as to the loss by the crown of certain of its feudal privileges, led to the passage of the statute 27 Henry VIII., the Statute of Uses hereinbefore referred to, the immediate effect of which was the abolition of uses in the simple form which we have been considering.<sup>1</sup>

**§ 325. Uses under the statute.**—Secondly, then, of the Statute of Uses. This statute, it is to be understood, was the outgrowth or culmination of the efforts of the party of the state to prevent what to them appeared to be an abuse of their rights as secured by the common law.<sup>2</sup> The statute as enacted was presumed to accomplish the end in view by converting the equitable interest or estate of the *cestui que use* into a legal estate—that is, to take such estate or interest out of the jurisdiction of the courts of equity, where it had recognition and protection, and so change the nature thereof that it became cognizable in courts of law, and hence to be governed solely by the principles of the common law.<sup>3</sup> The statute has so far answered the purpose of its makers that no use upon which it operates can exist in its former state for more than an instant; for by the terms thereof the seisin and possession are instantly attached to the equitable estate of *cestui que use*, thus investing it with all the attributes of a legal estate.<sup>4</sup>

**§ 326. Effect of statute upon uses.**—In dealing with the statute of uses the courts of common law announced the doctrine that no uses could be executed by the statute which were not limited in conformity with the rules of the common law.<sup>5</sup> And the courts have so far adhered to this con-

<sup>1</sup> Co. Lit. 271, Butler's note 231, sec. 3.

<sup>3</sup> Sand. Uses, 86; Gilbert, Uses (Sngden's ed.), 139, note.

<sup>2</sup> This view is supported by the language of the preamble to the statute, "to the utter subversion of the ancient common law of this realm."

<sup>4</sup> Greenl. Cruise, title "Use," ch. IV, sec. 3. See also thereunder, title 16.

<sup>5</sup> Greenl. Cruise, Dig., vol. 1, p. 363.

struction of the statute that the same technical words of limitation are required in the creation of estates through the medium of uses as in their creation at common law. And hence we find that, no matter whether a certain estate appears at law or in equity, it retains the name which was given it as a legal estate to indicate its quality and quantity. So that we speak of a legal or an equitable estate in fee, for life, etc.; and a modern use is defined as an estate which is acquired through the operation of this statute; and which, when it may take effect according to the rules of common law, is called a legal estate, and when it may not, is denominated a use, with a term descriptive of its modification.<sup>1</sup>

§ 327. *Illustrations.*—To illustrate: If A., seized of a freehold, desires to alien the same to B., he may do so by feoffment with livery of seisin (that is to say, by any method prescribed by the common law), or he may accomplish the same result by making conveyance to C. for the use of B., which use the statute will at once execute, thus vesting the legal estate in B.<sup>2</sup> But, as we have seen, there were certain conveyances to uses upon which the statute did not operate, and when such were limited, the effect was that no union of the legal and equitable estates in one and the same person resulted, and then both the legal and the equitable estates had still a separate existence.

§ 328. *Form of conveyance not affected by the statute.*—The statute was intended only to destroy the estate of the feoffee to uses by transferring it to the person who was thereunder entitled to the use, and not to destroy the *form* of the conveyance to uses.<sup>3</sup> The operation of the statute gave rise, therefore, to several new forms of conveyances which operate contrary to the rules of the common law. If we examine, for instance, the ordinary deed of conveyance generally in use at the present time, we find that it operates to transmit the seisin by way of the statute of uses; for such

<sup>1</sup> Cornish on Uses, p. 35.

<sup>3</sup> Bacon's Read. 39.

<sup>2</sup> Will. Real Prop. 150; 4 Kent's Com. 294.



a deed is simply proper evidence of the fact that A. has bargained with B. for certain lands, and paid to him the purchase price as agreed, whereupon B. holds to the use of A., and the statute, instantly executing this use, vests the legal title in A., without further act or proceeding by either party.<sup>1</sup>

§ 329. **The statute of uses still in force.**—The statute of uses is still very generally in force, and, as has been shown, holds an important place in the modern law of real property. Though we have discussed its origin and effect under the general title of “Equitable Estates,” the student will understand that every estate arising under the operation of this statute is a *legal* and not an *equitable* estate, and that it is solely by reason of the fact that the statute *fails* to operate in certain cases, that a class of equitable estates exists, the consideration of which will be our next undertaking.

§ 330. **Trust estates.**—And now of those estates arising by reason of the statute of uses failing to act in certain cases, and denominated generally as *trust estates*. As we have observed, the object of the statute of uses was to destroy that double property in land which resulted from the invention of conveyances to uses. Had the intention of its promulgators been carried into full effect, no use could ever have existed for more than an instant, for the moment a use was created the statute would have executed it, thus vesting both the legal and equitable estate in the *cestui que use*, and so destroying the equitable estate. But the strict construction put upon the statute by the courts defeated, in a large measure, the objects for which it was enacted. For it was held that there were certain uses upon which the statute had no effect. So that uses were not entirely abolished, but still continued separate and distinct from legal estates, and

<sup>1</sup>The effect of the statute of uses upon testamentary dispositions, and upon future estates and interests generally, will be discussed in the subsequent chapters on “Title by Devise” and “Executory Interests.” The example here given states the operation and legal effect of the warranty deed now in such general use in this country.

were recognized and supported by courts of chancery as such, under the general name of trusts.<sup>1</sup>

§ 331. **These estates defined.**—A trust is therefore a use not executed by the statute of 27 Henry VIII. Originally the words *use* and *trust* were perfectly synonymous, and both are mentioned in the statute.<sup>2</sup> But as the provisions of the statute were not deemed co-extensive with the various modes of creating uses, such uses as were not provided for by the statute were left to their former jurisdiction.

§ 332. **The same described and explained.**—A trust estate may be described to be a right in equity to take the rents and profits of lands whereof the legal estate is vested in some other person; to compel the person thus seized of the estate, who is called the trustee, to execute such conveyances of the land as the person entitled to the profits, who is called the *cestui que trust*, shall direct; and to defend the title to the land.<sup>3</sup> There are three distinct modes of creating a trust; that is to say, there are three principal cases in which legal estates, created upon trusts for certain purposes, will not be executed or transferred from the common-law grantee to the beneficiary by force of the statute.

§ 333. **Effect of active trusts, etc.**—In the first place an active duty might be imposed on the grantee of the land to do certain acts in reference to it for the benefit of somebody else. Land might be granted to A. upon trust to collect and pay over the rents to B. Here it would be evidently intended that A. should be the legal owner, but a conscientious obligation would bind him to carry out the trust upon which he had received the land. Where, therefore, an active duty was imposed upon the common-law grantee, the use or trust was not executed by the statute but was left to be enforced by the court of chancery.<sup>4</sup> Such a trust was known as an *active*, as opposed to a *passive* trust,

<sup>1</sup> Greenl. Cruise, Dig., vol. 1, p. 381. p. 381; 2 Washb. Real Prop. 458;

<sup>2</sup> 1 Preston, Estates, 184.

1 Spence, Eq. Jur. 494.

<sup>3</sup> Greenl. Cruise, Dig., vol. 1, <sup>4</sup> Harlow v. Cowdry, 109 Mass. 183.

wherein the trustee had no duties to perform further than to transmit the legal estate to the *cestui que trust*. If lands are conveyed to A. upon trust to allow B. to receive the profits, no active duty being imposed on A., this use is within the statute and is executed, the legal estate resting in B.<sup>1</sup>

§ 334. **Trusts in chattel interests.**—The second case was where a trust was declared upon a chattel interest. This case is not provided for by the statute. If, therefore, a term of years be given to A. in trust for B., the legal estate vests in A., and the trust could only be enforced by the court of chancery.<sup>2</sup>

§ 335. **Use upon a use, more at length.**—But the most important instance of the failure of the statute in this particular arises from a rule established in *Tyrrell's Case*,<sup>3</sup> where it was laid down that a use cannot be limited on a use. The reason given by Lord Bacon for this determination is, because the words of the statute are: where any person is seised of any *lands* or *tenements*, to the use of any other person; which exclude uses, as they do not fall within either of those descriptions.<sup>4</sup> By others, the failure of the statute to operate in such a case is put upon the ground that the ability of the common-law seisin to furnish forth the use was exhausted in supplying the vested legal interest in the *first beneficiary*, and could do nothing more with regard to the *second*; in other words, that the statute can operate but once in any given conveyance to execute a use.<sup>5</sup>

§ 336. **Statute can operate but once.**—Reasoning of a similar character led the lawyers to hold that when once the statute had been called into operation its powers were exhausted, and hence on a feoffment to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, it

<sup>1</sup> Digby, Hist. Real Prop., ch. VII, sec. 4.

<sup>2</sup> The student is again cautioned that, in certain jurisdictions, statutory enactments have changed this general rule. See Cornish,

Uses, 29, and Fletch., Trust, 27, for statement of rule.

<sup>3</sup> 1 Dyer, 155a.

<sup>4</sup> Bacon, Read. 43.

<sup>5</sup> Digby, Hist. Real Prop., ch. VII, sec. 4; Watkins, Conv., Introd. XX.

was impossible to give any effect to the limitation in favor of C. But as it was evident that B. was not intended to be benefited by that conveyance, the court of chancery took cognizance of the case, and decreed that B. should be the trustee of C. Thus the doctrine arose that there could not be a use upon a use, or, in other words, that if a use were limited upon a use in a conveyance, the statute would operate to execute the *first* use only. And thus was restored the distinction between the equitable and the legal estates which it was the design of the statute of uses to abolish.<sup>1</sup>

§ 337. What estates may be created in trusts.—Such is the origin of modern trusts<sup>2</sup> under which so large a portion of the landed property of this country is now held. The student must accustom himself to the meaning and use of these technical terms. The legal estate is vested in the trustee, in trust for the *cestui que trust*, who has the equitable estate. Whenever the rules of law are applicable, trusts or equitable estates or interests follow those rules. Thus an estate in trust may be created in fee, in tail, for life or for years. Such an estate, when of inheritance, will descend *ab intestato* according to the rules regulating legal estates.<sup>3</sup> Future estates in remainder and executory interests can be created in the same way, and are subject to the rule against perpetuities. The husband of *cestui que trust* is entitled to an estate by the courtesy, and the widow of the same to dower.<sup>4</sup>

§ 338. Trusts by implication of law.—Besides the creation of trusts of lands expressly by a declaration of the in-

<sup>1</sup> 1 Prest. Abst. 142. In *Hopkins v. Hopkins*, 1 Atk. 591, Lord Hardwicke said: "By this means a statute, made upon great consideration, introduced in a solemn and pompous manner, by this strict construction has had no other effect than to add, at most, three words to a conveyance."

<sup>2</sup> Mr. Sanders defines a trust to

be, "a right on the part of the *cestui que trust* to receive the profits and dispose of the lands in equity." 1 Sand. Uses, 267. This definition is adopted by Kent. 4 Kent's Com. 314.

<sup>3</sup> Will. Real Prop. 139; 2 Flint Real Prop. 631.

<sup>4</sup> Digby, Hist. Real Prop., ch. VII, sec. 4.

tent of the grantor, which, though complete in itself, is insufficient to convey the legal estate, there is also a large class of what are called *implied trusts*. Such trusts are also known as resulting trusts, and are especially saved from the requirement as to writing made in and by the statute of frauds. Thus where an estate is purchased in the name of one person and the consideration is paid by another, there is a resulting trust in favor of the person paying the consideration.<sup>1</sup>

§ 339. **Who may be made trustees.**— Any person, or even a corporation, not under disability of law, may be made trustee for another by direct grant, and in cases of implied or resulting trusts any person may sustain such a relation toward another. The estate of the *cestui que trust* is equivalent to legal ownership; it is alienable and devisable,<sup>2</sup> and also liable to be taken for the debts of its owner.<sup>3</sup>

For a further and more technical explanation of trusts in general the student is referred to works on equity jurisprudence and practice where the subject is treated at length.

<sup>1</sup> 2 Washb. Real Prop. 470, citing Nightingale v. Hidden, 7 R. I. 121.

<sup>2</sup> 1 Spence, Eq. Jur. 501.

<sup>3</sup> This is the general but not universal rule in the United States. It is statutory in England.

## CHAPTER XIV.

### EXECUTORY INTERESTS.

- § 340. Future estates in equity.
- 341. Contingent estates at law.
- 342. Contingent estates in equity.
- 343. Executory interests — How created.
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- 358. Are a species of executory interests.
- 359. Powers of appointment.
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- 361. Rules for construction.
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§ 340. **Future estates in equity.**— We have already devoted some time to future estates at law. We are now to enter upon the consideration of such estates when existing under and by virtue of the doctrines of equity. It will be remembered that contingent remainders are future estates which were continually liable, at the common law, until they actually vested, to be destroyed altogether.<sup>1</sup> But we find in those future estates and interests known generally

<sup>1</sup> Will. R. P. (17th ed.), p. 433. See *ante*, “Future Estates.”

as executory interests, a class of future estates which in their nature are indestructible.<sup>1</sup>

**§ 341. Contingent estates at law.**—A contingent remainder requires in every instance an estate of freehold to support it, and in every case where this supporting estate fails for any reason, or comes to an end before the happening of the contingency on which the remainder is limited to vest, the remainder is at once rendered void and of no effect, and the remainderman loses his estate. The reason underlying this rule is that at law the seisin passes out of the grantor to the tenant of the prior or supporting estate, and it is from such tenant, if at all, that the remainderman must take seisin; and, therefore, whenever such tenant loses his seisin by reason of the failure or determination of the prior estate, before the remainder is ready to vest, the rights of the remainderman determine also, because he thus becomes incapable of being seised of the estate in remainder.

**§ 342. Contingent estates in equity.**—It will be further remembered that one of the effects of the operation of the statute of uses was the doing away with the necessity of livery of seisin.<sup>2</sup> Applying this principle to the matter of future estates, we find that it thus became possible, by a conveyance to uses, to create future estates, dependent upon some contingency, but requiring no estate to precede or support them, and hence incapable of destruction by the premature failure of a supporting estate, for the seisin passed by mere operation of law in all cases upon which the statute operated.<sup>3</sup>

**§ 343. Executory interests — How created.**—Executory interests may be created either by deed or in a will.<sup>4</sup> Where created by the former, the conveyance must always be limited and operate by way of the statute of uses; but when

<sup>1</sup> 2 Blk. Com. 173; *Smith v. Hunter*, 23 Ind. 582; 2 Washb. Real Prop. 699.

<sup>2</sup> See preceding chapter.

<sup>3</sup> For a general discussion of this

subject, see the leading case of *Hopkins v. Hopkins*, Cas. t. Talb. 44.

<sup>4</sup> Will. Real Prop., chapter on Executory Interests.

arising under the latter they may be limited either with or without invoking the assistance of the statute. When created by way of the statute, either by deeds or in wills, executory interests are called springing uses, or shifting uses, according to their nature, to be hereinafter explained.<sup>1</sup>

§ 344. **Executory uses.**— It appears that the courts of equity had for a long period of time prior to the passage of the statute of uses given effect to a class of future or executory interests or estates, limited by way of uses, which were of a nature not cognizable in the courts of law. Upon the passage of the statute, however, *uses*, as such, ceased to exist and became estates at law. But in so doing they retained certain of the characteristics which had distinguished them in the courts of equity. Among the dispositions of property thus allowed were these executory interests in which the seisin is shifted about from one person to another as directed in and by these springing and shifting uses, to which the seisin has been indissolubly united by the statute of uses.<sup>2</sup>

§ 345. **Illustrations.**— For instance, if feoffment be made to A. and his heirs, to the use of B. and his heirs from tomorrow, the limitation, *at law*, would be void, because there would be a period of time during which the seisin would be without an owner, thus violating an established rule of law. But equity will enforce the use in favor of B. The student will perceive that this was not such a limitation as the statute could at once act upon to execute, because there was no *cestui que use* immediately entitled to take the legal estate. It was therefore left to become operative as an executory interest, in the shape of a *springing use*, so called because when the time arrived the right of B. would spring up of its own strength, depending on no prior supporting estate, and hence incapable of destruction by any failure thereof. It therefore now comes about that by means of uses the legal

<sup>1</sup> Gilbert, *Uses* (Sugd. ed.), 152, n.;  
Cornish, *Uses*, 19.

<sup>2</sup> Wyman v. Brown, 50 Me. 139;  
Wilson, *Uses*, 9.



seisin of lands may be shifted from one person to another in an endless variety of ways.<sup>1</sup>

§ 346. **Springing and shifting uses in practice.**—A simple illustration will serve to make plain the operation and utility of shifting uses. Suppose the case of a gift to A. and his heirs, to the use of B. and his heirs from to-morrow (already explained as a springing use), which we have seen is of no effect as an estate at law. But by means of shifting uses the desired result—that is, the giving of the estate to B. in fee after to-morrow—may be accomplished. For the estate may be conveyed to A. and his heirs, to the use of the grantor of A. and his heirs until to-morrow, and then to the use of B. and his heirs. Here the statute operates at once to execute the use, and vests the legal estate in the grantor of A. until to-morrow, when B.'s rights arise, and such legal estate thereupon instantly *shifts* from the grantor of A. over to B. and his heirs, and hence is called a shifting use.<sup>2</sup>

§ 347. **Remainders and future uses.**—Upon this branch of the subject Mr. Williams says: “By means of a use a future estate may be made to spring up with certainty at a given time. It may be thought, therefore, that contingent remainders, being destructible, would never have been made use of in modern conveyancing, but that everything would have been made to assume the shape of an executory interest. This, however, is not the case. For, in many instances, future estates are necessarily required to wait for the regular expiration of those which precede them; and when this is the case, no art or device can prevent such estates from being what they are, contingent remainders. For the law, having been acquainted with remainders long before uses were introduced into it, will never construe any limitation to be a springing or shifting use which, by any fair interpretation, can be regarded as a remainder.”<sup>3</sup>

<sup>1</sup> Will. R. P. (17th ed.), p. 435.

<sup>3</sup> Will. R. P. (17th ed.), pp. 436-37;

<sup>2</sup> Packard v. Ames, 16 Gray, 328. Fearn, Cont. Rem. 386 *et seq.*

§ 348. **Executory interests defined.**—Thus it will be seen that an executory interest is a future estate so limited that, while not good as a remainder, it is yet recognized as conferring the estate thereby created upon the person appointed to receive it, and differs from a contingent remainder chiefly in that it is incapable of destruction. It is also to be observed that by way of an executory interest a future estate may be limited after a fee.<sup>1</sup> Executory interests created by deed are now less frequently met with than when limited in wills, and when found in the latter instruments they are known generally as executory devises.

§ 349. **Executory devise defined.**—Mr. Fearne, in his work on Remainders, says that an executory devise is, strictly, such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law, and that it is only an indulgence allowed to a man's last will and testament when otherwise the words of the will would be void.<sup>2</sup>

§ 350. **Further defined.**—Again, an executory devise being the limitation by will of a future estate or interest in land which cannot take effect as a remainder, it follows that every devise of a future interest which is *not preceded* by an estate of freehold created by the same will, or which, being *so preceded*, is limited to take effect *before* or *after*, and *not at the expiration* of, such prior estate of freehold, is an executory devise.<sup>3</sup>

§ 351. **Origin of executory devises.**—The subject of testamentary disposition of lands will be treated at length in a subsequent chapter;<sup>4</sup> but it may not be out of place here to trace briefly the origin of that particular limitation in wills known as an executory devise. It would seem that from the earliest times the courts have ever

<sup>1</sup> Cornish, Uses, 92, 94; Co. Litt. 271b, note 231, sec. 3.

<sup>2</sup> Fearne, Rem. 882. See also 1 Jarman on Wills, 798.

<sup>3</sup> Jarman on Wills, 778.

<sup>4</sup> "Title by Devise," *post*.

shown great indulgence to testators. Before the passage of the statute of uses, wills were employed only in the devising of uses, which of course were rendered effectual by the courts of chancery. These courts, in permitting the devise of the *use* of such lands as were not *themselves* devisable, also allowed the creation of future estates and interests *by will* as well as in transactions between living persons.<sup>1</sup> But the passage of the statute of uses abolished for a time all wills of uses; this hardship was, however, so generally complained of, that parliament, a few years later, restored the right of testamentary disposition by the enactment known as the Statute of Wills (32 Henry VIII., ch. 1).<sup>2</sup>

§ 352. **Effect of the statute of wills.**—By this statute all estates at law became devisable, and the courts of law in the exercise of justice soon adopted the same lenient course of treatment with regard to testators that had formerly obtained in the courts of chancery in their dealings with them under the ancient use.<sup>3</sup> While the executor or usee had formerly been permitted to dispose of only the *beneficial* estate, he was now empowered to dispose of the legal estate as well, and future estates at law, invested with the important attribute of indestructibility belonging to all executory interests, were allowed to be created by will.<sup>4</sup> These future estates or interests when so created were termed Executory Devises, and possess generally the characteristics of the shifting uses heretofore explained.<sup>5</sup>

§ 353. **The executory devise in practice.**—The practicality and operation of limitations of this nature may be shown by an example. A testator may devise lands to his son A., an infant, and his heirs, but, in case A. should die under the age of twenty-one years, then to B. and his heirs. Here A. has an estate in fee simple in possession subject to an executory interest in favor of B. If A. should not die

<sup>1</sup> Will. R. P. 257.

<sup>4</sup> Will. R. P. 457.

<sup>2</sup> Passed in 1542.

<sup>5</sup> Lewis, Perpet. 78, 79; Will. R. P.

<sup>3</sup> Spence, Eq. Jur. 470; 2 Blk. 259.

Com. 382.

under the age of twenty-one years, his estate in fee simple will continue with him unimpaired; but in event of his dying under that age, nothing could prevent the estate of B. from immediately arising and coming into possession and displacing forever the estate of A. and his heirs.

§ 354. **May be effective without employing uses.**—The effect of this limitation so made in a will is identical with that which might have been produced by the employment of uses, for a gift to C. and his heirs to the use of A. and his heirs, but, in case A. should die under age, then to the use of B. and his heirs, would have effected the same result, and by means of uses the limitation would be a good one whether made in a will or a deed. Now a *conveyance* directly to A. and his heirs would vest in him an estate in fee simple, after which no limitation could follow. In such a case, therefore, a direction that if A. should die under age, etc., would be of no effect. Hence it becomes apparent that it is only by virtue of the peculiar rules applicable to limitations of future estates and interests when made in wills, that, in many instances, the intention of the testator is effectuated.

§ 355. **Power of alienation.**—In common with other contingent estates, executory interests and devises were formerly deemed inalienable.<sup>1</sup> But the restrictions have been gradually removed and such interests are now freely alienable. Thus, in the example above given, of a devise to A. and his heirs, but, in case A. should die under age, then to B. and his heirs, B. may by deed during A.'s minority dispose of his expectancy to another person, who, should A. die under age, will at once stand in the place of B. and obtain the estate in fee.

§ 356. **Powers.**—It oftentimes happens that grantors and testators are desirous of so disposing of their property that the title thereto will vest at once in some certain person, and thereafter shall be given to such person or persons as the original grantee or devisee, or some other person named

<sup>1</sup> Washb. Real Prop. 680; Wilson, Uses, 159; Jones v. Roe, 3 T. R. 95.

in the limitation, shall appoint to take it.<sup>1</sup> Thus lands may be devised to A. and his heirs, to such uses as B. shall thereafter by deed or by will appoint, and in default of and until B. exercises such power of appointment, to the use of C. and his heirs. Under this limitation a vested estate is conferred on C., subject to be divested at any time by B.'s exercising his power of appointment.

§ 357. **Definition and explanation.**—The student will perceive that this procedure presents a new mode of conveyance, operating through the medium of springing and shifting uses;<sup>2</sup> and inasmuch as such uses may be created either by deed or by will, lands may be transferred in this manner either by will or deed; for *powers*, as these forms of transfers are called, are methods of causing a use to spring up at the will or discretion of any given person.<sup>3</sup>

§ 358. **Are a species of executory interests.**—Powers are in form and general attributes executory interests, and are so called from the fact that their distinguishing feature is that some given person has the *power* to raise the use in another.<sup>4</sup> Powers before the statute of uses were merely directions to the trustee of the legal estate how to convey the estate. They were future uses to be designated by the person to whom the power was delegated. These, when they arose, equity compelled the trustee to observe; and when conveyances under the statute of uses became established, it was still usual to reserve or limit such powers as the exigencies of the case required; thus there arose powers to sell, lease, exchange, etc.<sup>5</sup>

§ 359. **Powers of appointment.**—These limitations are sometimes called *powers of appointment*. They confer on a person a power of disposition over some interest in lands quite irrespective of the fact whether or not he has any in-

<sup>1</sup> See Sugden on Powers, 4; Cornish, Uses, 19.

<sup>2</sup> Washb. Real Prop. 634.

<sup>3</sup> Will. R. P. (17th ed.), p. 438.

<sup>4</sup> Reference is not made to acts done by one as the agent or attorney of another.

<sup>5</sup> Sugden on Powers, p. 11.

terest in such lands himself,<sup>1</sup> though in certain cases the extent and duration of the power may be affected by the interest, if any, which the person who is to exercise the power possesses in the lands. He who grants the power is called the *donor*, while he who receives it is the *donee*.

§ 360. **Sometimes equivalent to an estate.**— But while a power does not necessarily import ownership in the donee, it will be seen that in a general appointment, that is one where the donee may appoint whomsoever he pleases as *cestui que use*, it comes to almost the same thing as ownership, for such donee may appoint himself and thus receive the interest in the lands. So it has been held that a devise to a person in terms importing that he may dispose of the property at his absolute discretion confers an estate in fee simple and not a power, though in a deed such form of limitation would merely confer a power of appointment.<sup>2</sup>

§ 361. **Rules for construction.**— In construing powers, when created by will, the courts observe that same indulgence with regard to the wishes of the testator which is exercised when dealing with executory devises in general, and as a result powers may be limited in a will without employing the statute of uses, but otherwise in a deed.<sup>3</sup>

§ 362. **Further requisites**— **Statutory changes, etc.**— Referring again to the example above given, suppose B. should exercise the power and appoint the lands *by deed* to the use of D. and his heirs. In this case the execution by B. of the instrument required by the power is the event on which the use is to spring up and to destroy the estate already existing. The moment, therefore, that B. has duly executed the power of appointment over the use in favor of D. and his heirs, D. has an estate in fee simple vested in him

<sup>1</sup> Digby, Hist. R. P., ch. VII, sec. 2. Mr. Washburn holds the opinion that powers have their origin and character solely from the statute of uses. 2 Washb. Real Prop. 635. Mr. Chance seems to think otherwise. Chance, Powers, secs. 5-12.

<sup>2</sup> Leake, Land Law, 387. The student will find statutory restrictions regarding this point in some of the states.

<sup>3</sup> 2 Washb. Real Prop. 382; Watk. Conv. 258; 4 Kent's Com. 319.

by virtue of the statute of uses in respect of the *use* so appointed in his favor, and the previously existing estate of B. is thenceforth completely at an end.<sup>1</sup> In the exercise of a power it is absolutely necessary that the terms of the power and all the formalities required by it should be strictly complied with. So if the power requires *a deed*, *a will* is not sufficient, etc., though it should be remarked that courts of equity and statutory enactments have done much to relieve the hardships arising from the defective execution of powers.

<sup>1</sup> Will. R. P. (17th ed.), p. 440.

## CHAPTER XV.

### MORTGAGES.

- § 363. Definition.
- 364. Signification of the term.
- 365. Effect of equitable doctrines.
- 366. Reasons for the rule.
- 367. The *mortuum vadium*.
- 368. The common-law mortgage.
- 369. Establishment of right to redeem.
- 370. The mortgagor's equity of redemption.
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- 373. Mortgage deeds.
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- 377. The lien theory.
- 378. Relation not defined in all states.
- 379. Forms of mortgages.
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- 381. Forms of mortgage deeds.
- 382. What estates may be mortgaged.
- 383. Rights and remedies.
- 384. Power of sale and transfer.
- 385. Releases.

§ 363. **Definition.**— A mortgage, as we have it in the law at the present day, is a conditional conveyance of an interest or estate in land, made for the purpose of securing the due performance of some obligation — usually of a pecuniary nature — by the grantor (mortgagor) therein.<sup>1</sup> Technically speaking, mortgages are common-law conveyances; but the doctrines of the courts of chancery have so attached thereto, that the rights of all parties concerned therein are now controlled rather by the principles of equity than by the rules of common law.

<sup>1</sup> Will. R. P. 349; Wing v. Cooper, 37 Vt. 179; Gibson v. Eller, 13 Ind. 125.



§ 364. **Signification of the word "mortgage."**—The term *mortgage* has thus become, in fact, a misnomer, though in the early law its signification as expressed by the word itself—mortgage, *dead-pledge*—was quite in point; for prior to the intervention of the courts of equity, the interest or estate of the mortgagor, as pledged by him, became *dead*, or entirely lost to him in case of default in performance on his part.<sup>1</sup> It was to alleviate this hardship that equity interfered by establishing the doctrine that, in case of default, the mortgagor should have a certain period of time within which to redeem his lands by paying to the mortgagee the amount of the debt as provided for in the obligation secured by the mortgage. Thus was there injected into the law a new interest or estate, which, from its origin and purpose, came to be known as the "equity of redemption."<sup>2</sup>

§ 365. **Effect of equitable doctrines.**—But, as we shall see, the courts of equity in their efforts to avoid the injustice usually arising out of the declaration of forfeitures—which in reality is the effect of a strict following of the letter of the conveyance—have so altered the rights and limited the powers of the mortgagee that, in most jurisdictions, the mortgage, notwithstanding its form and provisions, has ceased to be regarded as a *conveyance*, being looked upon as simply a lien upon the mortgaged property.<sup>3</sup>

§ 366. **Reasons for the rule.**—Sound reason, at least from a moral standpoint, for the principles thus established, is found in the fact that in by far the greater number of cases the consideration expressed in the mortgage is, in amount, far less than the actual value of the estate conveyed; and hence to allow the mortgagee to enter at once upon default of the mortgagor, as of an absolute and indefeasible estate,

<sup>1</sup>Litt., sec. 332; Goodall's Case, 5 Rep. 95; Wade's Case, id. 114.

<sup>2</sup>Mr. Cruise says it is not ascertained when this right was first allowed. Cruise, Dig., Mtgs., ch. 1, sec. 9.

<sup>3</sup>Green v. Hart, 1 Johns. (N. Y.) 580; Crippen v. Morrison, 13 Mich. 36. So held also in Georgia, Ohio, Iowa, California, Kansas, and many of the other states.

would be conferring upon the mortgagee something to which he is not in good conscience entitled, and depriving the mortgagor of an interest to which he is by the same criterion clearly entitled. It will be our purpose here to trace the important matter of a mortgage of lands from its earliest inception in our law to the present time, and thereby acquire a knowledge of those underlying principles, without which we can hope to have no proper understanding of the matter.

§ 367. *Vivum vadium*.—Mortgages are of very ancient origin, and at first a conveyance was made to the creditor under and by virtue of which he entered and held the lands until the debt was discharged. Such discharge was most usually effected either by means of the creditor applying the rents and profits of the lands to the reduction of the debt,<sup>1</sup> or by his taking such rents and profits absolutely as his own in lieu of interest, leaving the debtor to pay the principal sum out of other resources.

§ 368. *The common-law mortgage*.—These ancient methods were succeeded by a more stringent contract, under which the land was given in pledge until a certain day fixed for the payment of the debt, with a stipulation that on failure to pay at the appointed time the lands should remain to the creditor in fee. This amounted to an estate upon condition in the mortgagee and constituted the *mort-gage* or dead pledge hereinabove explained.<sup>2</sup>

§ 369. *Establishment of the right to redeem*.—And with regard to this transaction, if, at the common law, the condition were broken by the non-payment of the money on or before the date stipulated, the estate so conveyed became at once discharged from the condition, and vested an absolute estate in the mortgagee, for the parties were held strictly to their bargain.<sup>3</sup> This strict legal construction

<sup>1</sup> *Vivum Vadium*, Cruise's Dig., tit. Mortgages, ch. I, secs. 2, 3.

<sup>3</sup> *Goodall's Case*, 5 Rep. 95; *Wade's Case*, id. 114.

<sup>2</sup> *Mortuum Vadium*, Ibid., and secs. 4 and 5.

prevailed for a long period of years, but at length the courts of equity came to the relief of the mortgagor, and in the reign of Charles the First it was established as equity that the mortgagor should be allowed to redeem his estate, even though the stipulated date of payment had gone by, and the court of chancery, on the application of the mortgagor, would decree that, on payment of all which was due to him, the mortgagee should reconvey the estate to the mortgagor.<sup>1</sup>

**§ 370. The mortgagor's equity of redemption.**— Thus one of the first principles so established by the court of equity with regard to mortgages was what is known as the mortgagor's equity of redemption, which is an outgrowth of the equitable rule allowing the mortgagor to redeem his estate after it has become forfeited at law for some failure on the part of the mortgagor to perform the conditions imposed upon him. So firmly has the doctrine become engrafted upon the law of mortgages, that, by the weight of authority at the present time, the mortgagor, even though desirous of so doing, cannot release this right of redemption by any form of words or phraseology which he may see fit to make use of in the mortgage deed.<sup>2</sup>

**§ 371. Once a mortgage, always a mortgage.**— A further rule promulgated by the courts of equity and very generally followed is that whenever the conveyance of an estate is intended as a security for the payment of money, even though this intention do not appear from the deed itself, the transaction will be held to amount to a mortgage, to which the equity of redemption will attach notwithstanding the fact that the deed may be absolute on its face. This principle is shortly summed up in the phrase, "Once a mortgage, always a mortgage."<sup>3</sup>

<sup>1</sup> 1 Chan. Cas. 219; Emanuel Coll. v. Evans, 1 Ch. Rep. 10.

Ward, 2 Vern. 520; Tiernan v. Hinman, 16 Ill. 400.

<sup>2</sup> Orde v. Smith, Sel. Ch. Cas. 9, 2 Eq. Cas. Ab. 600, etc.; Waters v. Randall, 6 Met. 479; Jennings v.

<sup>3</sup> Story's Eq. Jur., §§ 10-19; Wynkoop v. Cowing, 21 Ill. 570; Lee v. Evans, 8 Cal. 424; Coote, Mortgages, 14.

§ 372. A mortgage is a chattel interest.—The court of chancery very early leaned toward the holding that the mortgagee does not take an estate in the land, but that he acquires merely a lien or charge thereon for the amount due to him, and hence that his interest is in the nature of personal property and so passed at his death to his personal representatives and not to his heirs.<sup>1</sup> So in equity the mortgagor came to be regarded as the owner of the mortgaged lands, and his equity of redemption treated as an equitable estate; and such indeed, generally speaking, is the law of to-day, the interest of the mortgagee being regarded as personal and not as real property.

§ 373. Mortgage deeds.—Mortgages, or, more properly speaking, mortgage deeds, are instruments of conveyance made use of where the owner of an interest or estate in property desires to furnish security for the payment of money or the due performance of some other obligation. In addition to the deed there is usually given some personal obligation, evidenced by a note or a bond. And in such case the mortgagee generally has the right to enforce payment or performance out of any assets which the mortgagor may possess. But it is sometimes the case that mortgages are given wherein it is stipulated that the mortgagee shall have no other remedy than that afforded by the mortgage itself.

§ 374. No uniform law of mortgages.—It is a principle of quite general application that the mortgagor occupies one position *at law* and another *in equity*; <sup>2</sup> but the student should constantly bear in mind that we have no uniform law of mortgages in the United States, and hence reference must be had to the statutes and decisions of the state in which the mortgaged property is situated, in every instance. What is set down here upon the subject can go no further than the enunciation and explanation of the general principles.

<sup>1</sup> Jackson v. Delancey, 11 Johns. 365; Burt v. Ricker, 6 Allen, 78; 2 Washb. Real Prop. 141.

<sup>2</sup> 2 Wash. Real Prop. 97; Express Co. v. Bank, Wright (Ohio), 249; Hughes v. Edwards, 9 Wheat. 500.

§ 375. **Estate of mortgagee at common law.**— At common law the mortgagee acquired a fee-simple title, together with seisin of the land, and an immediate right of entry into actual possession, thus leaving the mortgagor in possession under practically the same rights as though he were tenant by sufferance.<sup>1</sup> But, as we have seen, these rules of the common law have been abrogated in many of the states and seriously questioned in others.

§ 376. **The two theories of the mortgage relation.**— The doctrines of equity have made such serious inroads upon the common-law theory of mortgages that in the majority of the states the rules laid down by the earlier law are no longer strictly observed or enforced. There appear to be, at the present time, two theories of the mortgage relation. In one of these the legal title is presumed to be in the mortgagee, leaving the interest of the mortgagor an equitable one as between the mortgagor and mortgagee; but as to all other persons regarding the former as the legal owner, he (the mortgagor) retaining possession and seisin, until, by his default, he has made it possible for the mortgagee to have pursued the remedy or remedies thereupon afforded him by statute.<sup>2</sup>

§ 377. **The lien theory.**— Other states adhere to what may be termed *the lien theory* of mortgages.<sup>3</sup> In these states the mortgage is not in effect a *conveyance*, notwithstanding it is such in form. The legal title does not pass to the mortgagee, even as against the mortgagor. The mortgagee gets no estate at law in the land; he is not entitled to possession, and can maintain no action at law therefor, either before or after condition broken. His sole remedy consists in a sale of the property, either under a power or by decree of court, according to the particular statute. In these jurisdictions the *actual intent* of the parties is observed to the exclusion

<sup>1</sup> *Rogers v. Grazebook*, 8 Ad. & in Massachusetts, Maine, Ohio, Illinois and Connecticut.  
El. 895, note s; Coote on Mortgages, 327 *et seq.*

<sup>3</sup> See citations to § 365, *supra*.

<sup>2</sup> So held, at least theoretically,

of that apparently expressed by the language of the mortgage deed.<sup>1</sup>

§ 378. **In some states relation not defined.**—Again, in some states, at the present time, it is a difficult matter to determine which of the theories above outlined is in force, there being no general trend of statutory enactments and decisions upon which to base conclusions.<sup>2</sup> It is believed, however, that the statement is warranted when it is said that, taken altogether, the positive tendency of the law of this country is toward a full recognition of those principles regarding the law of mortgages which have been herein referred to as “the lien theory.”<sup>3</sup>

§ 379. **Forms of mortgages.**—With regard to their form, mortgages are of several different kinds. Since, as we have seen, the intention of the parties controls, deeds absolute on their face will be construed to be mortgages in those cases where the intention was merely to afford security for the proper discharge of an obligation.<sup>4</sup> Formerly, and perhaps in England at the present day, the method of depositing the title deeds to lands with the obligee was often pursued when it was desired to create a lien for security upon landed property.<sup>5</sup> This practice never obtained generally in this country, and now, owing to our system of laws providing for the recording of all evidences of title,<sup>6</sup> it has become practically obsolete and of no avail. It is no longer necessary with us that the owner of lands be in position to produce the original title deeds when he desires to alien his property.<sup>7</sup>

§ 380. **Liens — Mechanic's, vendor's, etc.**—In many of the states statutory enactments have given to persons per-

<sup>1</sup> See 3 Pom. Eq. Jur., sec. 1186.

<sup>2</sup> This would seem to be the actual condition of the matter in Illinois. See *Oldham v. Pfeiffer*, 84 Ill. 102; and *Vallette v. Bennett*, 69 Ill. 632.

<sup>3</sup> Authority for this statement rests on the fact that many states

have changed their former holdings and now favor the lien theory.

<sup>4</sup> *Howard v. Harris*, 2 Ch. Cas. 147; *Batty v. Snook*, 5 Mich. 231.

<sup>5</sup> *Corning, Ex parte*, 9 Ves. Jr. 115.

<sup>6</sup> See *Griffin v. Griffin*, 18 N. J. Eq. 104.

<sup>7</sup> See “Titles by Private Grant,” *post*.

forming labor or furnishing materials for the improvement of the premises of others a lien, which is in effect a statutory mortgage.<sup>1</sup> Again, where one conveys land to another for a valuable consideration, the vendor has, by law, a lien upon the premises in question until the purchase price is paid according to the terms of the contract, and, if not so paid, the vendor may enforce such lien substantially as in the case of mortgages.<sup>2</sup>

**§ 381. Forms of mortgage deeds.**—Of the technical mortgage deed, there are now in general use two forms: First, a mortgage; second, a deed of trust in the nature of a mortgage. In the former the title is conveyed directly to the mortgagee, as has been before explained. In the latter, conveyance is made to a trustee, who takes the title for the benefit of the legal holder of the obligation, to be secured, whosoever he may be. Each of the above forms possesses certain advantages, but it is probable that, taken as a whole, the deed of trust, or trust deed, as it has come to be called, is the more preferable. The matter, however, is largely one of convenience.<sup>3</sup>

**§ 382. What estates may be mortgaged.**—Any interest or estate in landed property which is alienable may be made the subject of a mortgage conveyance.<sup>4</sup> Thus, an estate in fee, for life, or for years, or indeed a mere interest, as, for instance, one arising under an executory devise, may be pledged for the due performance of an obligation.<sup>5</sup>

**§ 383. Rights and remedies.**—The rights and remedies of the parties to a mortgage deed vary with the statutory provisions of the different states.<sup>6</sup> In general, however, the principles common to all conveyances are applied, and the proceedings by which the mortgagee satisfies his claim

<sup>1</sup> See "Involuntary Alienation,"  
*post*.

<sup>2</sup> Jones on Liens, sec. 1063, and  
notes.

<sup>3</sup> See "Titles by Private Grant,"  
*post*.

<sup>4</sup> Washb. Real Prop. 40.

<sup>5</sup> Holbrook v. Betton, 5 Fla. 99.

<sup>6</sup> Actions at law for trespass,  
etc., are brought by the mortgagor  
so long as he is rightfully in pos-  
session.

(called foreclosure), generally contemplate a hearing in court and an accounting between the parties.<sup>1</sup> The right of the mortgagee to sell under a power given in the deed is still upheld in many states, though the tendency of the more modern law is against such method of procedure as being inequitable.<sup>2</sup> In general, the rights and remedies of all parties to, or interested in, a mortgage deed are established and enforced according to the laws of the state in which the property in controversy is situated.

§ 384. **Power of sale and transfer.**—When the mortgagee so desires, he may transfer his interest to a stranger by making to him an assignment in writing in due form. In the case of a trust deed, however, no such writing is necessary, delivery of the note or other obligation, properly indorsed, being all that is required. The mortgagor may, as a matter of course, make conveyance of his interest by deed in the usual manner, but his grantee will, of course, take subject to the rights of the mortgagee.

§ 385. **Releases.**—When the obligation upon which the mortgage relation is founded has been discharged, it becomes the duty of the mortgagee to provide the mortgagor with a proper release. This should be done by deed duly executed and recorded.

<sup>1</sup>For statutory provisions on foreclosure, see *Stimson's Am. Stat. Law*, secs. 1920–1936. *Chowning v. Cox*, 1 Rand. (Va.) 306. Power of sale in mortgages is abolished by statute in Illinois.

<sup>2</sup>See *Wing v. Cooper*, 37 Vt. 184;



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CHAPTER XVI.

INVOLUNTARY ALIENATION.

- § 386. Voluntary alienation.
- 387. Involuntary alienation.
- 388. Creditor's rights.
- 389. The writ of *elegit*.
- 390. Why so named.
- 391. The modern writ of execution.
- 392. Time for redemption.
- 393. The sheriff's deed.
- 394. Statutes of limitation.
- 395. The Illinois statute.
- 396. Exemptions.
- 397. Bankruptcy.
- 398. Eminent domain.
- 399. Continued.
- 400. Escheat and forfeiture.
- 401. In the American law.
- 402. Taxation — Equity.

§ 386. **Voluntary alienation.**— The several modes of acquiring interests and estates in real property through purchase which we have thus far considered are all primarily referable to and predicated upon the consent, either express or implied, of the parties to the transaction. The law compels no one to take as a purchaser except he desires to do so. Where one parts with his title to landed property under a contract or agreement either express or implied, it is called in legal phrase *voluntary alienation*.

§ 387. **Involuntary alienation.**—We come now to the consideration of another class of cases, wherein the owner is compelled by law to part with his interest or estate in real property without any consideration whatever of his desires in the matter. This is termed *involuntary alienation*, and is exercised under the circumstances and in the several ways hereinafter set forth.<sup>1</sup>

§ 388. **Creditor's rights.**—No sooner had landed property become settled as an object of ownership, and so a thing of value in the possession of its owner, than ways and means were fixed upon whereby interests and estates in such property became as a matter of law a security for the payment of such owner's debts and obligations. These rules of law proceeded upon the theory that it is obviously unjust for one to enjoy the benefits of such property rights while he is justly indebted to others. But the common law recognizes the claim of no person against another to the extent of giving him a lien upon the property of his debtor until he has reduced his claim to judgment by a regular proceeding in a court of competent jurisdiction.<sup>2</sup>

§ 389. **The writ of *elegit*.**—In the early days of the common law, upon judgment being rendered in favor of the claimant, a writ known as the *writ of elegit* issued out of the court wherein the judgment stood, under and by virtue of which the holder thereof was empowered to seize upon the one-half part of the lands of his debtor and to remain in possession and enjoyment of the same until the income thus derived amounted to a sum sufficient to satisfy his claim.<sup>3</sup>

§ 390. **Why so called.**—This ancient writ of *elegit* received its name from the fact that thereunder the creditor

<sup>1</sup> Reference is not had herein to the law of mortgages.

<sup>2</sup> Statutes generally have changed this rule in particular cases, as, for instance, in *lis pendens*, attachment, etc.

<sup>3</sup> Stat. 13 Edw. I., ch. 18. A somewhat similar right was also given by 13 Edw. I., ch. 3 (generally known as the Statute of Merchants). See 2 Blk. Com. 160-162.

was enabled to choose (make his *election*) between taking the goods and chattels of the defendant under the process called *feri facias*<sup>1</sup> or a going into possession of the lands as above set forth.<sup>2</sup>

§ 391. **The modern writ of execution.**—The writ of *elegit* was the forerunner of our modern writ of *execution*, or *feri facias*, as it is now generally termed. As we have seen, under the writ of *elegit* the creditor acquired no estate in the lands of his debtor, nor had he any interest therein which he might sell or convey to another. This manifest defect, resulting as it did in a feeling of insecurity in such cases, led to the passage of an act in 1732 (5 Geo. II., ch. 7) by which lands, hereditaments and real estate became chargeable with debts and subject to the like process of execution as personal estate; that is, to be seized and sold to satisfy the creditors' claims.<sup>3</sup>

§ 392. **Time for redemption.**—In some of the states the creditor is bound to exhaust the personal estate before proceeding against the realty, and in all the states certain restrictions<sup>4</sup> are placed upon the creditor in the pursuance of his rights under the writ; and the debtor is almost universally given a certain length of time within which to redeem his lands after the sale thereof has taken place. As a general proposition, the judgments of courts of plenary jurisdiction are a lien upon any landed property which the debtor may have at the date of their rendition, or may acquire thereafter while such judgments remain in force and effect and unsatisfied.

§ 393. **The sheriff's deed.**—In those states where the levy and sale are made by the sheriff, a deed is given by him to the creditor at the expiration of the period for redemption, and thereupon the creditor becomes invested with such

<sup>1</sup> Prior to *elegit* the creditor was bound to exhaust the personal property first, and could have recourse to realty only in case the former proved insufficient.

<sup>2</sup> Digby, Hist. Real Prop., ch. V, sec. 5.

<sup>3</sup> 4 Kent's Com. 428 *et seq.*

<sup>4</sup> Such as homestead exemptions, etc.

estate or interest in the lands as his debtor formerly possessed.

§ 394. **Statutes of limitation.**—The law, in its effort to discourage litigation upon stale claims and to definitely settle the questions arising with regard to titles, has applied certain principles, in the nature of limitations with regard to time, to the rights of creditors in this regard.

§ 395. **The statute in Illinois.**—For instance, the statute of Illinois provides: "That no person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he, or those from, by, or under whom he claims, have been seised or possessed of the premises, except as hereinafter provided."<sup>1</sup> Section 4 of the said chapter provides: "Actions brought for the recovery of any lands, tenements or hereditaments, of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, from this state or the United States, or from any other person," etc.; and by section 6 of the same chapter: "Every person in the actual possession of lands or tenements under claim and color of title;" and payment of taxes, even if to vacant land (sec. 7), "shall be brought within seven years next after possession being taken as aforesaid."<sup>2</sup>

§ 396. **Exemptions.**—In this connection should be mentioned the matter of exemptions, by which is meant that a certain portion of the lands of the debtor cannot be taken in execution. The details of the statutes relating to the matter of exemptions differ with the laws of the various states. In Illinois we find the following: "Every householder, having a family, shall be entitled to an estate of homestead, to the extent in value of \$1,000, in the farm or lot of land, and buildings thereon, owned or rightly possessed by lease or otherwise, and occupied by him or her as a resi-

<sup>1</sup> Rev. Stat. Ill., ch. 83, sec. 1.      tions are not available as against

<sup>2</sup> But in every case these limitations are not available as against persons under legal disability.

dence; and such homestead and all right and title therein, shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided."<sup>1</sup>

§ 397. **Bankruptcy.**—The act of congress regarding bankruptcy, passed in 1898, provides among other things that the title to the property of the bankrupt remains in him until a trustee is appointed and qualified. Hence if no trustee be appointed the title of the bankrupt is not divested.<sup>2</sup> The trustee upon his appointment and qualification is vested with title by operation of law without a deed of conveyance, as of the date that the bankrupt was so adjudged.<sup>3</sup>

§ 398. **Eminent domain** is the right or power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare.<sup>4</sup> In pursuance of this right or power the state may deprive a person of his property or of some right or interest therein; thus, it may be taken or held by the state, or vested in corporations for public use, as in the case of highways, parks, public buildings and the like; or to be used by private corporations, transacting business of a public nature, as railroad or telegraph companies.

§ 399. **Continued.**—To be sure, such appropriation can be made only upon the payment of just compensation, but nevertheless it is a method of enforcing involuntary alienation.<sup>5</sup> The nature of the proceedings necessary to accomplish this result varies with the laws of the different states.

§ 400. **Escheat and forfeiture.**—Closely allied to this doctrine of eminent domain is the law of escheat and forfeiture. The word *escheat* signifies, in the original, chance

<sup>1</sup> Rev. Stat. Ill., ch. 52, sec. 1; <sup>3</sup> Act of 1898, sec. 70a. See also *Fight v. Holt*, 80 Ill. 84; *Turner v. Loveland* on Bankruptcy, 283. Bennett, 70 Ill. 263.

<sup>4</sup> Lewis, Eminent Domain, sec. 1.

<sup>2</sup> There is no difference in this regard between voluntary and involuntary bankruptcy. <sup>5</sup> See *Bloodgood v. M. & H. R. Co.*, 18 Wend. (N. Y.) 57.

or accident, and under the feudal system occurred when there was a failure of heirs to take upon the decease of an ancestor. In such event the right to the lands was again fully vested in the original grantor or lord of the fee.<sup>1</sup> For when the blood of the last tenant of the fee is, by some means or other, utterly extinct and gone, there is no one to inherit. Lands might also have been escheated to the crown by the commission of some act on the part of the tenant in fee which led to his attainder, and consequently to the corruption and extinction of heritable blood in him. So in that early day if one were convicted of felony, his lands passed by escheat or forfeiture to his lord.<sup>2</sup>

§ 401. *In the American law.*—Escheat and forfeiture as above described are unknown in the American law. They are abolished under the statutes of the United States. But the rights of forfeiture and escheat still exist in a modified form in many of the states. It is quite generally provided that where no owner or claimant can be found, the title to the lands thus left without a proprietor shall escheat to the state.<sup>3</sup> It is thought, however, that this provision of the law goes rather upon grounds of public policy than upon principles referable to the old common-law doctrine of escheat and forfeiture. The policy of the law at the present day is averse to forfeitures.<sup>4</sup>

§ 402. *Taxation.—Equity.*—As a means of enforcing the revenue laws, provision is made by statute in the various states for the taking of property for the non-payment of the taxes levied thereon.<sup>5</sup> Finally, it remains to be said that, under certain circumstances and conditions, courts of equity and courts exercising chancery powers will compel debtors to part with the title to real property to satisfy the claims of their creditors.<sup>6</sup>

<sup>1</sup> 2 Blk. Com. 244-246.

<sup>2</sup> Glanville, VII, ch. 17.

<sup>3</sup> See, for example, Rev. Stat. Ill., title "Escheat."

<sup>4</sup> Even forfeiture for waste has met with but slight favor with us.

<sup>5</sup> For a full discussion of this subject, see Blackwell on Tax Titles and Desty on Taxation.

<sup>6</sup> Consult Story's Equity on this subject.

## CHAPTER XVII.

### INCORPOREAL HEREDITAMENTS.

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**§ 403. Distinction between corporeal and incorporeal.** The student will doubtless call to mind that early in this work we discussed somewhat the distinction between corporeal and incorporeal property, and ascertained that, when applied to real property, the latter is known in the law under the name of *incorporeal hereditaments*.

**§ 404. Possession, as against mere rights.**—Looking at the matter from a practical standpoint, we see that in all cases of corporeal hereditaments the owner thereof has possession of the land itself, that is to say, the owner's right is accompanied with the possession of a tangible thing; while, on the other hand, estates in or rights over lands which are in the possession of another, being mere rights unaccompanied by the possession of anything tangible, are termed incorporeal hereditaments.<sup>1</sup> It is of hereditaments purely incorporeal that we propose to treat herein.

**§ 405. Distinction as to modes of creation and transfer.** With reference to the creation and transfer of corporeal and incorporeal hereditaments, there formerly existed a marked distinction. Corporeal hereditaments at the common law were mainly transferable by that livery of seisin which was essential to a feoffment, and for this reason they were said to *lie in livery*; while incorporeal hereditaments, when transferred apart from the possession of the land, were always required to be conveyed by the delivery of a deed. They were therefore said to *lie in grant*, for this word "grant," though it comprehends all kinds of conveyances, yet, strictly

<sup>1</sup> Will. R. P. (17th ed.) 333.



speaking, indicates a conveyance by deed only.<sup>1</sup> In this country, at the present time, both corporeal and incorporeal hereditaments lie in grant; that is, the ownership thereof may be transferred by deed alone.

§ 406. **Hereditaments purely incorporeal.**— Again, attention must be directed to the fact that certain estates or interests in lands, such as reversions, remainders and executory interests, while partaking largely of the nature of incorporeal hereditaments, are not purely incorporeal, since they are created and exist upon the hypothesis that sooner or later their character will change to that of corporeal hereditaments.<sup>2</sup> But there is a class of valuable things, that is of property rights intimately connected with or arising out of landed estates, which never are or never can become tangible in their nature,<sup>3</sup> and such property rights are termed hereditaments purely incorporeal.<sup>4</sup>

§ 407. **Divisions of this class of incorporeal hereditaments.**— Of this class of hereditaments the law makes three divisions: first, such as are *appendant* to corporeal hereditaments; second, such as are *appurtenant* thereto; and third, such as are *in gross*, or exist as separate and independent subjects of property.<sup>5</sup> Of those property rights which fall within the first and second of the above divisions it should be said that the law regards them as so intimately and inseparably connected with the tangible property of the estate upon which they are created that they will pass in every instance by a conveyance of such estate itself without the necessity of their being specially mentioned. They are regarded as mere incidents of such estates.<sup>6</sup>

§ 408. **Conveyance when in gross.**— But property rights coming under the third division are looked upon as standing separate and apart from the principal estate and by no means as a part thereof. They consequently require a sepa-

<sup>1</sup> Shep. Touch. 228.

<sup>2</sup> Will. R. P. 197.

<sup>3</sup> Will. R. P. 265; 2 Washb. R. P. 272.

<sup>4</sup> 2 Blk. Com. 17; Preston, Estates, 13, 14.

<sup>5</sup> Will. R. P. (17th ed.) 478.

<sup>6</sup> Co. Litt. 121b.

rate deed for their transfer. But almost all purely incorporeal hereditaments may exist both as appendant or appurtenant and in gross, being at one time appendant or appurtenant to corporeal property, and at another time separate and distinct from it.<sup>1</sup>

§ 409. **Incorporeal hereditaments appendant** consist of such incorporeal hereditaments as are not naturally and originally appendant to corporeal hereditaments, but which have been annexed to them either by some express deed of grant or by long enjoyment (called prescription).<sup>2</sup> Rights of common and of way of the property of another are illustrations of this sort of hereditaments. It is common practice among conveyancers to use the word "appurtenances" in deeds, though if the hereditament be in fact appendant or appurtenant it will pass without the use of such or similar words.<sup>3</sup>

§ 410. **Difficulty of distinguishing between them.**—But it is oftentimes a matter of some difficulty to determine whether the hereditament be appurtenant or in gross, and hence the general use of the word "appurtenances" in deeds even at the present day. Thus, where the owner of two parcels of land has created a way across one lot for the benefit of the other, this right of way will not pass upon a severance of the estate unless it is necessary to the enjoyment of the part conveyed, or words are used in the conveyance sufficient to create a new way.<sup>4</sup>

§ 411. **Specific classes of incorporeal hereditaments.**—Blackstone mentions some nine or ten classes of incorporeal hereditaments,<sup>5</sup> among which rights of common, easements, rents and franchises only are of interest and value to the student of American law. To the discussion of the above we shall also add that of licenses.

<sup>1</sup> Will. R. P. (17th ed.) 478.

<sup>2</sup> Will. R. P. (17th ed.) 483.

<sup>3</sup> George v. Cox, 114 Mass. 382.

<sup>4</sup> Parsons v. Johnson, 68 N. Y. 62;

Plimpton v. Converse, 42 Vt. 712.

Examine in this connection, McTavish v. Carroll, 7 Md. 352.

<sup>5</sup> 2 Blk. Com. 21.

§ 412. **Definitions and explanations.**—To take up these classes in the order named, a right of common is that right in the land of another which enables the owner of the right to take from such land some substantial product or products which constitute a part of the realty by reason of their connection therewith. This right imposes no obligation upon the owner of the land to maintain any supply of the thing taken. The term *right of common* has largely lost its significance in this country.

§ 413. **Kinds of rights of common.**—There are (or were), according to Blackstone, four important kinds of appendant incorporeal hereditaments known as rights of common, viz.: (1) of pasture, (2) of piscary, (3) of turbary, (4) of estovers, indicating (1) a right to pasture cattle on the lands of another, (2) to take fish from waters upon the land of another, (3) to take turf or peat for fuel from another's land, (4) a right to take such wood from the land of another as may be necessary for the proper conduct of the estate of him who is to exercise the right.

§ 414. **Rights of common not now of great importance.** Rights of common were anciently of great importance, arising as they did of necessity out of the peculiar form of land-holding then in vogue in England. But under our laws, and the requirements of land-holding in America, rights of common have lost their importance, and have come to be created in the same manner and to receive almost the same construction as *easements*. Furthermore, the distinction between commons appendant and appurtenant has been but little observed in this country; indeed it seems doubtful if commons appendant ever existed with us. The cases upon matters connected with rights of common seem to have recognized them as existing, appurtenant and in gross only.<sup>1</sup> In our discussion of the more important matter of easements, which is now to follow, we shall have occasion to

<sup>1</sup> Herbert v. La Valle, 27 Ill. 448; Edwards v. McClung, 39 Ohio St. Thomas v. Mansfield, 13 Pick. 240. 41; Donnell v. Clark, 19 Me. 174.

become familiar with all necessary principles governing the subject of rights of common.

§ 415. **An easement defined.**—An easement may be defined to be a right in or issuing out of the land of another, which, in its operation, restricts the owner's right of enjoyment. It may act affirmatively by giving the holder thereof the right to use the land for certain purposes, or negatively by preventing the owner from doing that which he might otherwise have done with or upon his land. Thus, the holder of an easement may have the right thereunder to pass over the lands of another, or, on the other hand, to restrain the owner of lands from erecting buildings of a certain kind or in a certain place thereon.<sup>1</sup> In common with other incorporeal hereditaments, easements may be either appurtenant or in gross.<sup>2</sup>

§ 416. **The dominant and servient estates.**—To understand more fully the matter in hand, it should be noticed that in every case where an easement exists there are two estates or interests in the land, viz.: that of the holder of the easement and that of the owner of the land. The former is termed the *dominant* and the latter the *servient* estate.<sup>3</sup>

§ 417. **How created or conveyed.**—An easement, being an estate or interest in land, may be created in the manner of other estates or interests; that is, either by gift or grant. But, unlike other estates or interests, easements may be created by *implication* as well as by express grant. For instance, if A., being the owner of eighty acres of land, the east side only of which lies along the highway, sells to B. the west forty acres thereof, B. will by necessity have the right to pass over the land of A. to reach the highway. In other words, B. will have an easement by implication.<sup>4</sup>

<sup>1</sup> See 2 Washb. Real Prop. 299-301. Easements, 5; Walker, Am. Law, 265.

<sup>2</sup> Knecken v. Voltz, 110 Ill. 264.

<sup>3</sup> Kent's Com. 435; Washb.

<sup>4</sup> Knipp v. Curtis, 71 Cal. 62, 11

Pac. R. 879; Duinnee v. Rich, 22 Wis. 554.

§ 418. **Easements by prescription.**— So also may an easement be gained by long and uninterrupted user, oft-times called *prescription*, though this term is open to objection; for prescription, as known at the common law, is no longer in practical application with us, its place and object being fulfilled by our statutes of limitation, of which we shall have occasion to speak later on.<sup>1</sup> An easement, however, being, as it is, an interest in real property, cannot be created by parol.<sup>2</sup>

§ 419. **Creation by separate instrument.**— While it is customary to create an easement by a reservation of the right in a deed of general conveyance, it may be done quite as effectually by a separate instrument which operates to create or convey the easement only.<sup>3</sup>

§ 420. **Requirements of easements by implication.**— With regard to easements by implication it may be further said that the necessity need not be absolute; for instance, in the example heretofore given (§ 417) of an easement thus created, it would not be essential for the one claiming the right of way to show that in no other manner could he have gained access to the highway. It is sufficient if it appears that without the easement he could not enjoy his estate in full, except at unusual cost or inconvenience.<sup>4</sup>

§ 421. **Kinds of easements recognized in our law.**— As a practical matter our law commonly deals with but five kinds of easements: rights of way, of light, of support, of party-walls, and in or to waters.<sup>5</sup> As a matter of course, other servitudes may be imposed upon landed estates, but a discussion of the above mentioned will fully serve our purpose.

<sup>1</sup>Ferris v. Brown, 2 Barb. 105; Mass. 196; Gilbert v. Peteler, 38 Washb. Real Prop. 105. Barb. 489.

<sup>2</sup>Taylor v. Millard, 118 N. Y. 244, 23 N. E. R. 376; Gobb v. Canal Co., 18 Pick. (Mass.) 340. <sup>4</sup>Lanier v. Booth, 50 Miss. 410; Thompson v. Miner, 30 Iowa, 517; Valley Falls Co. v. Dolan, 9 R. I.

<sup>3</sup>Richardson v. Clements, 89 Pa. 489; Oliver v. Hook, 47 Md. 301. St. 503; Ashcroft v. E. R. Co., 126 <sup>5</sup>2 Washb. Real Prop. 299.

§ 422. **The doctrines of equity in this connection.**— We find in regard to easements, that, in common with all other rights, interests and estates in land, the doctrines of the courts of equity have greatly modified the strict rules of the common law, and that easements are often recognized in equity under circumstances of which the courts of law would take no cognizance. For instance, at law the dominant and servient estates cannot exist at one and the same time in the same owner;<sup>1</sup> but in equity such a state of affairs may exist, and upon the sale by such owner of one of such estates, the servitude will become an easement at law, provided its continuance is essential to the enjoyment of the estate so conveyed.<sup>2</sup>

§ 423. **Easements distinguished from conditional estates.**— Another class of easements, which approaches very closely in its nature to estates upon condition, arises where land is conveyed in several parcels by an owner to several purchasers, and the grantor imposes certain conditions with reference to the manner of the enjoyment of the various grantees, which are for the mutual benefit of all. Here equity will decree such covenant or agreement to have the force and effect of an easement, and it will run with the land.<sup>3</sup> The easement may here be distinguished from the estate upon condition, for there will be no forfeiture in case of non-compliance. An injunction to prevent the improper use of the land, or an action at law for damages when such use has been made, are the only remedies given to those who have the right to complain.

§ 424. **Rights of way.**— Rights of way are of two kinds—public and private. They are easements which authorize the public generally, or certain persons, as the

<sup>1</sup> This is true for the reason that at law there would occur what is known as a merger—the absorbing of the lessor by the greater estate.

<sup>2</sup> *Brakely v. Sharp*, 9 N. J. Eq. 9;

*Gerber v. Grubell*, 16 Ill. 217; *Smith v. Smith*, 62 N. H. 429.

<sup>3</sup> Building lines are examples of this sort of easements. *Pittsburg, etc. R. Co. v. Reno*, 123 Ill. 273; *Graves v. Deterling*, 120 N. Y. 447.

case may be, to pass over the land in the usual course and for the purpose of traffic and travel. Such easements may be created by grant, express or implied, or by prescription in the case of private ways, or by dedication, or through eminent domain, where the way is a public one. Public ways are generally known as highways.

§ 425. **The double ownership in the soil.**—In the absence of agreement or arrangement of some kind to the contrary, the soil to the middle of the highway belongs to the adjacent owners. Whenever land is converted into a highway, either by dedication or under the power of eminent domain, the public acquires no interest in the soil, but merely the right of user for highway purposes; and this it loses whenever it ceases to use it as such, and the easement is thereby at an end.<sup>1</sup>

§ 426. **Light and air.**—Though what is known in the English law as the doctrine of ancient lights has never been generally recognized in this country,<sup>2</sup> yet there may be an easement in the light and air coming from over the land of an adjacent owner, under which one could prevent such adjacent owner from obstructing it by buildings or otherwise.<sup>3</sup> The rules governing this easement are substantially those of rights of way.

§ 427. **Easements in waters.**—Riparian owners have the right to make usual and customary uses of the waters of the stream, but they must not diminish the flow, corrupt the water, or dam it up. The general rule is that the water must not be so used as to produce a perceptible damage to any other proprietor.<sup>4</sup>

§ 428. **Tidal waters and navigable streams.**—In this country, the title to the bed of the sea, as of all tidal waters, is presumptively in the state, and usually extends to high-

<sup>1</sup> Benham v. Potter, 52 Conn. 248:      <sup>3</sup> Maynard v. Esher, 17 Pa. St. 222.  
Holden v. Shattuck, 34 Vt. 336.      <sup>4</sup> Dummont v. Kellogg, 29 Mich.

<sup>2</sup> Parker v. Foote, 19 Wend. 309; 420, 18 Am. R. 102; Miller v. Miller, Washb. Easements, 492; Myers v. 9 Pa. St. 74.  
Gammel, 10 Barb. 543.

water mark.<sup>1</sup> At common law, a navigable stream was one in which the tide ebbs and flows. But this is not the rule in the United States. With us all streams are considered as navigable streams which are, in fact, capable of actual navigation. But generally, as at common law, the title to the beds of all rivers in which the tide does not ebb and flow is in the riparian owners.<sup>2</sup> But this is not the universal rule.<sup>3</sup> A grantee of lands bordering upon large lakes takes title only to the water's edge. This is especially true of the Great Lakes.<sup>4</sup>

§ 429. **Percolations.**—Where water percolates through the soil from one tract of land to another, the owner of the land may divert such percolation by collecting the water in a well, notwithstanding it results in serious damage to the adjacent owner. The rules with reference to riparian owners as announced above do not apply.<sup>5</sup>

§ 430. **Right to lateral support.**—Every owner of land has the right to the lateral support afforded by the adjoining land; nor can he make excavations on his own land which will deprive the land of the adjacent owner of such support.<sup>6</sup> But this right extends only to the support of the adjoining land or surface in its natural condition, not increased by the erection of buildings thereon.<sup>7</sup>

§ 431. **Party-walls.**—Party-walls are generally erected by express agreement between the parties, each paying his share of the expenses, and a party-wall is one which is erected between two lots or parcels of land for the common benefit of the owners thereof in supporting the beams of their adjoining buildings. They are not tenants in common of the

<sup>1</sup> Ill. Cent. Ry. Co. v. State of Illinois, 146 U. S. 387.

<sup>2</sup> Ice Co. v. Shortall, 101 Ill. 46.

<sup>3</sup> McManus v. Carmichael, 3 Iowa, 1.

<sup>4</sup> Delaphine v. Railroad Co., 42 Wis. 214.

<sup>5</sup> Ocean Grove Ass'n v. Asbury Park, 40 N. J. Eq. 447.

<sup>6</sup> Beard v. Murphy, 37 Vt. 101; Thurston v. Hancock, 12 Mass. 220.

<sup>7</sup> Tied. on Real Prop., sec. 618.

For cases on rights of subjacent support, see Ottumwa Lodge v. Lewis, 34 Iowa, 67, 11 Am. R. 135, and Graves v. Berden, 26 N. Y. 501.



entire wall; each has title to one half, with an easement for support in the other half. Adjacent owners may acquire party-wall rights as against each other by prescription.<sup>1</sup>

**§ 432. Easements, how extinguished.**—An easement may be released by deed, or lost by abandonment, but mere nonuser will not of itself extinguish the easement.<sup>2</sup> So if the owner of the dominant estate do or suffer to be done some thing which increases the burden of the servient estate, or changes its nature, the easement is lost.<sup>3</sup>

**§ 433. Rents.**—At the present day, when we speak of *rent* we generally refer to the compensation paid by tenant for years to his landlord; but those hereditaments, purely incorporeal, known as *rents*, of which we are about to speak, are rights to rents issuing out of lands, but wholly unconnected with the relation of landlord and tenant.<sup>4</sup> This species of rent consists in a right to the periodical receipt of money, or money's worth, in respect of lands which are held in possession, reversion or remainder by him from whom the payment is due.<sup>5</sup> The common law made three distinct classes of these rents, known as rent-service, rent-seck and rent-charge.

**§ 434. Rent-service.**—When in the olden time the owner of a feud conveyed his estate therein in whole or in part, he reserved to himself what was known as a *rent-service*, which was to be paid to him by the grantee. Later on by its operation the Statute *Quia Emptores* abolished the tenure necessarily incident to every reservation of a rent-service of a fee, so that since the passage of the said statute, which is still generally in force in this country, no rent-service can be reserved out of a fee.<sup>6</sup>

<sup>1</sup> *Cole v. Hughes*, 54 N. Y. 444, 13 Tex. 465, 1 S. W. R. 178; *Chicago, Am. R. 611.* etc. *R. Co. v. Hicox* (Mich.), 44 N. W.

<sup>2</sup> *Eddy v. Chace*, 140 Mass. 471. R. 143; *Doane v. Badger*, 12 Mass. 65.

<sup>3</sup> On the subject of the term of easements, see the following cases: <sup>4</sup> *Digby, Hist. Real Prop., App., sec. 1.*

*McConnell v. Am. Bronze Co.*, 41 52 Washb. on Real Prop. 272.

N. J. Eq. 447; *Bullen v. Runnels*, 2 62 Washb. Real Prop. 273; *Wal- N. H. 255; Carpenter v. Craber*, 66 lace v. Harnstead, 44 Pa. St. 495.

§ 435. **Rent-service only in certain estates.**— We find, therefore, as a matter of practice, that since tenure of this nature still exists between reversioner or remainderman and tenant of a term of years, a rent-service may be reserved in a lease when the same is made between parties standing in that relation to each other.<sup>1</sup>

§ 436. **Distinguishing feature of rent-service.**— The distinguishing feature of rent-service is, that inseparably connected therewith is the right of the owner of the rent to distrain upon the goods and chattels of the grantee and sell the same to satisfy his claim for rent due and unpaid to him by the grantee. This right of distress has always been an incident of rent-service, and arises on the creation thereof without the necessity of special mention.

§ 437. **Rent-charge and rent-seck.**— Where lands are granted in such manner that the payment of the rent reserved is made a lien or charge thereon, the rent is called a *rent-charge*, provided further that right of distress be given the owner of the rent by some express stipulation. If no right of distress be so given the rent owner, he is said to possess a dry rent, or a *rent-seck*. It will be observed, therefore, that the distinction between these two kinds of rent in our present law relates only to the manner of their enforcement. The *rent-charge* can be enforced by the summary process of distress, while *rent-seck* could be collected by action against the person only.

§ 438. **Fee-farm rents.**— Under the term *fee-farm rents* are included both of the above kinds of rents, and they will therefore be considered together under that term, for our purposes.

§ 439. **In what estates rents may be created.**— Any of the common-law estates may be created in a rent. And where a rent is granted it is itself the subject of a grant; where it is reserved, it is the lands that are the subject of the grant, and the rent comes in lieu of the land.<sup>2</sup>

<sup>1</sup> Will. Real Prop. 247.

<sup>2</sup> 2 Washb. Real Prop. 275.

§ 440. **Fee-farm rents in our law.**—Fee-farm rents, though unusual in our law, are not unknown in this country and are proper conveyances, and there is nothing in the law here inconsistent with their being brought into more general use.<sup>1</sup> With us the old common-law right of distress has been quite generally superseded by statutory remedies, the effects of which are, however, not substantially different.<sup>2</sup>

§ 441. **Rules governing creation and alienation.**—The rules for the creation and alienation of rents of this class or estates therein do not essentially differ from those prescribed in the case of the other estates at law and hence need no especial consideration here. So far as applicable the incidents of such estates are present in those created in rents; for instance, if the owner of a rent purchase an unincumbered fee out of which the rent issues, the two will merge.<sup>3</sup> But upon the death, without heirs, of one possessed of a rent-charge in fee, the rent ceases by extinguishment. The rent may also be extinguished by prescription.<sup>4</sup>

§ 442. **Franchises.**—Franchises are defined to be special privileges conferred by the sovereign power on individuals, and which do not belong to the citizens generally by common right.<sup>5</sup> These privileges, though usually granted to and held by artificial persons, that is, corporations, are still classed as hereditaments, notwithstanding the fact that, owing to the fiction of perpetual succession appertaining to persons of this class, there can be no idea of inheritance connected therewith.<sup>6</sup> It has been held, however, in particular cases, that a franchise may be a private estate in fee, without being appendant to a corporeal tenement.<sup>7</sup>

§ 443. **Examples of franchises.**—The right of maintaining ferries, bridges, railroads, telegraph lines, and the like enterprises, in the operation of which the public has an

<sup>1</sup> See 3 Dane Abr. 450; *Adams v. Bucklin*, 7 Pick. 121; *Alexander v. Warrance*, 17 Mo. 228.

<sup>2</sup> *Smith, Land. and Ten.*, 161, note.

<sup>3</sup> *Cook v. Brightly*, 45 Pa. St. 440.

<sup>4</sup> *Tudor's Lead. Cas.* 199.

<sup>5</sup> *Bank of Augusta v. Earle*, 13 Pet. 519.

<sup>6</sup> 3 *Kent's Com.* 459.

<sup>7</sup> *Clark v. White*, 5 Bush, 358.

interest, are the most usual examples of franchises, and in all such instances the right to operate must be obtained from the state.

§ 444. **Franchise and charter distinguished.**—A franchise granted to a corporation must not be confounded with its charter. The latter is the contract of the state with the corporation; the former one of the privileges conferred by the contract. The franchise of a corporation may be sold as one of its property rights without affecting its right to existence under the charter. Again, the franchise may be transferred and operated by another, where this right is not restricted by the charter. Enough has perhaps now been said to give the student some understanding of the nature of a franchise, and a further investigation of the subject may be pursued, if desired, in some work devoted to the law of corporations.<sup>1</sup>

§ 445. **Licenses.**—The term *license*, as used in the law of real property, indicates an authority or right given one by an owner to make use of land in some specific or particular manner. A license is not created by deed or prescription, and hence is not a right or interest issuing out of the land, but merely a *personal* right or interest which ends with the death of either licensor or licensee, and is terminated by a sale or transfer of the land.<sup>2</sup>

§ 446. **License distinguished from easement.**—A license differs from an easement not only because it is not an interest in or issuing out of the land, but also by reason of the power which the licensor possesses to revoke it. This power he may lawfully exercise in all cases where the license is an executed one, and even in those instances where it is still executory, provided that the revocation will leave the parties in the same condition as before the license was granted.<sup>3</sup>

<sup>1</sup> As Elliott, Thompson, or Morawetz.

599. 2 Am. Lead. Cases (5th ed.) 549, note.

<sup>2</sup> Post v. Pearsall, 22 Wend. (N. Y.) 425; Forbes v. Balenseifer, 74 Ill. 183; De Haro v. U. S., 5 Wall.

<sup>3</sup> Veghte v. Raritan, 19 N. J. Eq. 154; Cook v. Stearns, 11 Mass. 533.

**§ 447. In what manner licensee may exercise his authority.**—The authority given to the licensee must be exercised by him in a reasonably prudent manner and consistently with the terms thereof. For breach of such terms, or for negligence or lack of usual skill in the exercise of his right the licensee will be responsible for any damages which are the natural consequences thereof.<sup>1</sup>

**§ 448. Revocation not retroactive, etc.**—Though the licensor has the broad power of revocation heretofore referred to, its exercise by him can never be held to have a retroactive effect, unless such revocation be based, with good cause, on the fault of the licensee.<sup>2</sup> Thus, if one has received license to hunt game upon the lands of another, and such license be revoked without fault on the part of the licensee, he does not thereby become a trespasser. But otherwise had he taken advantage of his license to do an injury to the land of the licensor.<sup>3</sup>

**§ 449. How granted.**—Licenses may be granted by implication, or expressly by parol agreement.<sup>4</sup> For example, innkeepers by implication extend a license to the public to enter their premises for the purpose of becoming their guests; or if A. give B. authority, either verbally or in writing, to take fish from waters on his land, B. has an express license. Licenses of the latter sort, being in the nature of personal contracts, are not assignable.

<sup>1</sup> Prince v. Case, 10 Conn. 375;  
Kent v. Kent, 18 Pick. 569.

<sup>2</sup> Selden v. Del. & Hud. Canal Co.,  
29 N. Y. 639.

<sup>3</sup> Six Carpenters' Case, Smith's  
Lead. Cases, 84.

<sup>4</sup> Wood v. Leadbitter, 13 M. & W.  
838; Muskett v. Hill, 5 Bing. N. C.  
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PART IV.

THE CREATION AND TRANSFER OF ESTATES  
AND INTERESTS IN LANDED PROPERTY.

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CHAPTER XVIII.

OF TITLE TO THINGS REAL IN GENERAL.

- § 450. Introductory.
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- 452. Development of title.
- 453. The second stage.
- 454. The third stage.
- 455. The source of title.
- 456. Descent and purchase.
- 457. Title by descent.
- 458. What included in an inheritance.
- 459. Heirs, who may be — Rights of, etc.
- 460. Heirship, by what law determined.
- 461. Heirship, how determined.
- 462. Heirs must be relatives.
- 463. Affinity.
- 464. Further rules of descent.
- 465. Taking *per capita*, etc.
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§ 450. **Introductory.**—It would be of but small advantage to the student of real-property law to gain a knowledge of the *theory* of that law, without pursuing his researches further and becoming familiar with the *art* of putting into practical use those principles which the foregoing chapters have sought to outline and impress upon his mind. When dealing with so technical a branch of the law, it becomes essential, in the first place, to acquire an understanding of the great principles upon which the rules governing it are

based. Having accomplished this, the student is prepared to undertake the no less important matter of determining the means by which abstract rules are made applicable to the practical operation of the law. Much that has been gone over, of necessity had reference solely to the law as it was in former times; in our studies from this point forward we shall have much to do with the law as it stands at the present day. With these purposes in view, we shall now proceed to investigate what is known in the law as "title," and the manner in which it may be acquired or lost.

§ 451. **Title.**—Title is the means whereby the owner of lands or other real property has the just and legal possession and enjoyment of it.<sup>1</sup> Lord Coke says that it is that by which one holdeth and defendeth the land.<sup>2</sup> So that one is said to have title to that which is of right his property, and his property is that over which he may of right exercise an exclusive dominion. Whether title to property has its source in bare possession or mere occupation of the estate, without any apparent or even pretended right to continue in such possession, is a mooted question.<sup>3</sup> If we can conceive that at some time individual ownership in lands was not recognized, we may by slight speculation imagine the origin of such ownership as arising from the act of a person in taking actual manual possession of a piece of land, formerly unoccupied and unclaimed, and remaining thereon until his right thereto was established by common consent. But the very use of the term "right" implies the possibility of some claim by another against whom this right is to be upheld.

§ 452. **Development of title.**—For practical purposes at least, there is probably no better division of titles, with reference to the stages of their progressive development, than that made by Blackstone.<sup>4</sup> According to his division the

<sup>1</sup> Greenl. Cruise, Dig., title Descend, ch. 1, § 2.

<sup>2</sup> 1 Co. Litt. 345b.

<sup>3</sup> 2 Blk. Com. 195 *et seq.* *Contra*, Maine, Ancient Law, 256.

<sup>4</sup> The views of Blackstone on this

subject are adopted by Mr. Cruise. See Cruise, Dig., star page 312. These views assume the existence of individual rights in landed property.



first stage or degree is the bare possession or actual occupation of the estate, without any apparent right, or any pretense of right, to hold and continue such possession. While perhaps wrongful in its inception, this naked possession is *prima facie* evidence of a legal title in the possessor, and is available to him against all the world except the true owner; and such a title may by lapse of time, if such true owner does not assert his right, ripen into an indefeasible title in the holder thereof. We may well conclude, therefore, that the basis of all good title is possession.

§ 453. **The second stage.**—Proceeding along this line, we find the next step to a good and perfect title to be *the right of possession*, and that this right of possession may be in one person, while the actual possession rests with another. The right to possession is however of more value than the bare possession; for by asserting this right in the manner provided by law, the owner thereof may oust the mere possessor, and thus acquire for himself both actual possession and the right thereto.

§ 454. **The third stage.**—When the possession, the right of possession, and the right of property are united in one and the same person, that person has a perfect title. For the union of the possession, the right of possession and the right of property constitutes a complete title to lands, tenements and hereditaments.<sup>1</sup> Mr. Washburn quotes with apparent approval the language of Judge Walker, who says that title means the same thing as ownership.<sup>2</sup> It would appear, however, that this is rather the statement of a conclusion than an explanation of the matter in hand. Indeed, it would be very difficult, in the opinion of the writer, to formulate a more satisfactory explanation of the use and signification of the word “title” than that given us by Blackstone as outlined above.

§ 455. **The source of title.**—It is a principle worthy of notice that from an early day in civilization the primary

<sup>1</sup> Greenl. Cruise, Dig., star page      <sup>2</sup> 3 Washb. Real Prop. 4.  
315; Coke, Inst. 286a.

source of all title or ownership has been regarded as resting in the sovereign power. This principle, so fundamental in the feudal system, is scarcely less effective in the allodial; for, as has been sought to be explained heretofore in this book,<sup>1</sup> the practical distinction between these two systems is, that in the former the sovereign has no power to completely divest itself of title to lands, while under the latter it may invest an individual with all the interest which it possesses therein.

§ 456. **Descent and purchase.**—It is agreed by all the writers that there are two modes only of acquiring a title to land, namely, *descent* and *purchase*;<sup>2</sup> both of which have heretofore been explained. It will, however, be convenient, if not technically correct, for us to make a further division of titles by purchase into those acquired in some way other than by gift or grant, as, for instance, by occupancy, limitations, etc., and those acquired by gift or grant, either public or private.<sup>3</sup>

§ 457. **Title by descent.**—Pursuing these subjects in due course, we come first to that of title by descent. Whenever the title to real property is vested in a person by the single operation of the law, such person is said to have title by descent.<sup>4</sup> Therefore *descent*, or, as it is sometimes called, hereditary succession, is the title whereby a person, on the death of his ancestor, acquires his estate as his heir at law. An heir is he upon whom the law casts the estate immediately on the death of the ancestor, and an estate so descended on the heir is in law called an inheritance.<sup>5</sup> This heir at law cannot be deprived of the estate except by express devise or necessary implication,<sup>6</sup> nor can the heir by any act of his own avoid the estate so cast upon him.

<sup>1</sup> See introductory chapter.

<sup>4</sup> 1 Inst. 18b.

<sup>2</sup> 3 Washb. Real Prop. 4.

<sup>5</sup> Greenl. Cruise, Dig., star page

<sup>3</sup> While perhaps not specifically

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so set forth, this is, nevertheless, the classification adopted by Mr. Washburn.

<sup>6</sup> Haxtun v. Corse, 2 Barb. Ch. 506; Gage v. Gage, 9 Foster (N. H.), 533; Doe v. Lavins, 3 Ind. 441.

§ 458. **What included in an inheritance.**— Everything which properly falls under the denomination of real estate descends to the heir, as do also such other chattels as are annexed to the freehold, together with all other things which come within the terms “fixtures” or “chattels real.”<sup>1</sup> Hereditaments, of course, so descend, and in many instances even a contingent interest will pass to the heir.<sup>2</sup> One cannot be an heir to anything but real estate.<sup>3</sup> Since the heir takes by operation of law solely, and not by any act or volition of the ancestor, a living person can have no heirs; that is to say, that so long as the ancestor is alive, it is impossible to determine what person or persons will survive him to take the estate as heir or heirs.<sup>4</sup> Again, the *ancestor* being the person from whom the property descends, a child or grandchild may in the legal sense be the ancestor of its parents or grandparents.<sup>5</sup> The common law, in deference to the every-day custom of speaking of relatives as “heirs,” made use of the expressions “heir apparent” and “heir presumptive.” These terms, however, have no practical application in our law, for such persons have no rights in the property of their ancestors which are recognized at law.<sup>6</sup> The heir thus having no vested interest in the property of his ancestor, it logically follows that there is no obligation resting upon the ancestor to devise his property to those who at his death intestate would be his heirs. But where by his will the ancestor has devised property to certain of his children, and has omitted to name or include one of them in such devise, a legal presumption arises that it was an accidental omission, and such child will be let in to claim the share of the estate of the testator to which he would have been entitled in the case of intestacy.<sup>7</sup> But

<sup>1</sup> Green v. Massie, 13 Ill. 363.

<sup>6</sup> Tied. Real Prop., sec. 663, note;

<sup>2</sup> Clapp v. Stoughton, 10 Pick. 463.

Gardner v. Page (Ky.), 11 S. W. R.

<sup>3</sup> Brac. Law Tracts, 128; Lincoln 779.

v. Aldrich, 149 Mass. 360.

<sup>7</sup> Bradley v. Bradley, 24 Mo. 311;

<sup>4</sup> Will. Real Prop. 96.

Gage v. Gage, 29 N. H. 533.

<sup>5</sup> 3 Washb. Real Prop. 18.

where the ancestor desires so to do, and clearly expresses such intention in his will, he may leave his property to whomsoever he sees fit.

§ 459. **Heir, who may be — Rights of, etc.**— The estate of the ancestor which descends to the heir so descends subject to be divested, if required, for the payment of the intestate's debts.<sup>1</sup> Intestacy is presumed in every case, and the presumption cannot be rebutted except by the production of a valid will.<sup>2</sup> And, generally speaking, a title by descent is deemed worthier than one by devise, so that if a devisee take the same property exactly as if there had been no will, he will be deemed to take as an heir and not as a devisee.<sup>3</sup> Posthumous children inherit to the same extent as though born during the life-time of the father.<sup>4</sup> By statute, in most states, illegitimate children are made the heirs of their mothers;<sup>5</sup> this rule is in derogation of the common law, under which they could be the heirs of no one. Statutory provisions have also been passed in a majority of the states with regard to the matter of inheritance of kindred of the half blood, who, at common law, could take nothing as heirs.<sup>6</sup> The tendency of our law is to admit them to the privileges of inheritance.<sup>7</sup> Where it appears that an heir has received a part of the estate during the life-time of his father, such part will be deducted from his share as an heir. The sum thus advanced is called an *advancement* and may consist of real and personal estate. But it must be made clearly to appear that what the heir had taken previously was in fact an advancement.<sup>8</sup>

§ 460. **Heirship, by what law determined.**— Owing to the fact that the laws of the various states are not uniform on questions arising with regard to the matter of descent, it has been found necessary to establish some general rule by

<sup>1</sup> 3 Washb. Real Prop. 18.

<sup>2</sup> Lyon v. Kain, 36 Ill. 368.

<sup>3</sup> Ellis v. Page, 7 Cush. 161.

Changed by statute in many states.

<sup>4</sup> 4 Kent's Com. 412.

<sup>5</sup> The common-law rule has been

abrogated in all but one or two states.

<sup>6</sup> 2 Blk. Com. 227.

<sup>7</sup> See 3 Washb. Real Prop. 15.

<sup>8</sup> This matter is regulated by statute.

which heirship and the like questions may be determined, and such rule is expressed by the statement that the descent of real property is governed by the law of the place where the land is situated, and that law of descent governs which was in force at the date of the death of the ancestor.<sup>1</sup> The place of residence of the ancestor, or of the heir, is of no effect in determining questions of descent. All the states have statutory enactments governing the descent of real property within their territorial limits. Many of the statutes are identical, being adapted one from the other, and all have many points in common. But it is apparent that any question of inheritance, descent or heirship can be settled only by reference to the statutes of the state within which the land in question is situated.

§ 461. **How heirship is determined.**—There is a marked distinction between the principles governing the descent of real property under the civil and at the common law. This is of importance to us, as many of the states of our Union have adopted in part the rules of the civil law. The distinction chiefly to be borne in mind is that, at common law, the title to real property always *descended*,—that is, it passed from father to son, to the child of the son, etc. In other words, a man's father or grandfather could not become his heir under any circumstances. Under the civil law the term "descent" was made use of to indicate merely the passing of the title to the heir, and who was such heir did not of necessity enter into the question. We use the term in this latter sense, and say that property *descends* to the heir, though as a matter of fact the father receives title through the intestacy of his son.

§ 462. **Heirs must be relatives.**—But whether the question is to be determined by the rules of civil or of common law, only those persons who are in some way related to the ancestor can take as his heirs. But this relationship is of two kinds—by *consanguinity* and by *affinity*. The first is

<sup>1</sup> Potter v. Titcomb, 22 Me. 300; Elsava v. Farmer, 7 Ala. 543; Emmert v. Hays, 88 Ill. 11.

that relationship which arises from a community of blood, and exists between persons descended from a common ancestor, who is called the *stirpes* or root. And further, consanguinity is of two kinds: *lineal* and *collateral*. Lineal exists between persons who descend from one another in the direct or single line of descent, as father, grandfather, etc., or son, grandson, etc. Collateral consanguinity occurs where the relationship is traced through different lines of descent to the common ancestor. Thus, brothers, cousins, nephews, uncles, etc., are related by collateral consanguinity.

§ 463. *Affinity*.—At common law only kindred by consanguinity could become the heirs of an ancestor.<sup>1</sup> But in our law the relationship created by marriage, either between the immediate parties thereto, or of their respective relatives, is recognized as conferring the right of inheritance. To distinguish this mode of inheritance from that existing between relatives of the same blood, the law designates it by the term *affinity*. By statute, in most of the states, the husband and wife inherit from each other, as, indeed, may *their* blood relations. But it is to be understood that persons can never take as heirs by affinity, except in the absence of lineal heirs, and in some jurisdictions they are even postponed to collateral heirs.<sup>2</sup>

§ 464. *Further rules of descent*.—The law of primogeniture<sup>3</sup> has never been in force in this country. It will be remembered that this is the rule of the English law, by which the real estate descended to the *eldest* son, to the exclusion of the other sons and daughters. In this country the lineal descendants in the descending series inherit equally, no matter whether they be males or females.<sup>4</sup> Indeed, the assertion may be ventured that our law follows much more closely the civil than the common law with regard to the matter of descent.<sup>5</sup>

<sup>1</sup> 2 Blk. Com. 246; *Cleaver v. Cleaver*, 39 Wis. 96, 20 Am. R. 30.

<sup>2</sup> For statutory details, see 3 Wash. Real Prop. 21, note.

<sup>3</sup> 1 Spence, Eq. Jur. 176.

<sup>4</sup> Walker's Am. Law, 353.

<sup>5</sup> 4 Kent's Com. 378.

§ 465. **Taking per capita.**—Where lineal descendants stand in the same degree removed from the intestate ancestor, they inherit in equal shares, and in such case they are said to take *per capita*. But if they are removed in different degrees, as where, for instance, there is a son, and the children of a deceased daughter, such children will take only the share of the deceased daughter, taking *per stirpes* and not *per capita*.<sup>1</sup> In the United States the doctrine of inheritance *per stirpes*, or by representation, has generally been limited in its application to the descendants of brothers and sisters, while in the case of all other collateral kindred the inheritance is divided *per capita*.<sup>2</sup>

§ 466. **Alienage, etc.**—By the statutory enactments of many of the states, alienage is a bar to inheritance. There are many special provisions in the different states regarding this matter of title by descent which it would be out of place to discuss here. The student must of necessity consult the statutes of the various states, or some specially prepared work thereon, to acquire the information which cannot be given here.

<sup>1</sup> *Skinner v. Fulton*, 39 Ill. 484.

<sup>2</sup> See Stimson, *Am. Law*, for statutory enactments.

## CHAPTER XIX.

### TITLES OTHER THAN BY GRANT.

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- 468. Nature and origin of title by occupancy.
- 469. In the English law.
- 470. Public lands in the United States.
- 471. Estoppel — Definition.
- 472. Estoppel by deed.
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- 492. Abandonment — Definition, etc.
- 493. To what kind of property applicable.
- 494. What acts constitute.
- 495. Summary.
- 496. Accretion — Definition, etc.
- 497. Avulsion.
- 498. Summary.

§ 467. **Involuntary alienation.**—The subject of involuntary alienation was treated at some length in a former chapter, but the view therein taken was from the stand-



point of the owner, rather than from that of the purchaser. We have left for our own consideration the several instances, other than that of descent, wherein the title to landed property may be acquired by a person who has no other relationship either in law or otherwise to the former owner of the land. Such titles are always conferred, or at least *confirmed*, and made available, by operation of law. The principal modes of so acquiring title are as follows: Occupancy, estoppel, prescription and limitation, accretion, and abandonment. These we shall take up in their order.

#### OCCUPANCY.

§ 468. **Nature and origin of title by occupancy.**—Blackstone says that occupancy is the taking possession of those things which before belonged to nobody, and that this is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind.<sup>1</sup>

§ 469. **In the English law.**—The law of England restrained the right of acquiring title by occupancy to the single instance where a man was tenant *pur autre vie*, or held an estate to himself only (excluding his heirs), for the life of another person, and died during the life-time of such other person by whose life the estate was holden. In such case, he who could first enter on the land might lawfully retain the possession thereof so long as such other person lived, by right of occupancy.<sup>2</sup> But the law, both in England and this country, has been changed by legislation so that at the present day the interest left at his death by a tenant *pur autre vie*, who dies prior to the one by whose life the estate is measured, is governed by the general laws of descent and distribution.<sup>3</sup>

<sup>1</sup> 2 Blk. Com. 258 *et seq.*

<sup>2</sup> 3 Washb. Real Prop. 51.

<sup>3</sup> 2 Blk. Com. 258; 3 Wash. Real Prop. 51.

§ 470. **Public lands in the United States.**— Under the system of landholding in vogue in this country, there is not, nor can there be, any such thing as common property in lands. The primary title to all landed property, as we have already seen, is in the government; and hence, when not owned by private persons, lands are the property of the state, or of the United States, as the case may be. In colonizing this country, England disregarded the claims of the aborigines to the lands therein, and granted such lands to the colonies, by whom they were retained at the close of the Revolutionary war. The territory embraced in the original colonies has been extended by conquest and purchase, and to all this property the government holds the primary title.<sup>1</sup> There are, therefore, no lands in this country without an owner; and the only manner in which an individual can obtain title to public lands is through grant from the government.<sup>2</sup> In view of what has just been said, it is apparent that title by occupancy, exclusively, no longer holds an important place in our law.

#### ESTOPPEL.

§ 471. **Definition.**— Title by estoppel arises in certain cases where either equity or law, in furtherance of justice, draws certain conclusions from the acts of one party in favor of another, in respect to the ownership of lands, which it does not permit the first mentioned party to controvert or deny.<sup>3</sup> An estoppel does not create an estate nor take it from one for the benefit of another. It merely concludes the parties from asserting or denying the state of the title.<sup>4</sup> Estoppels are of two kinds: by deed and *in pais*.

§ 472. **Estoppel by deed.**— When one has, in and by his deed, made an express or implied representation that he was at the time of the making thereof possessed of the title which such deed purports to convey, and such representation be false, he will be estopped to deny the validity of the

<sup>1</sup> 1 Kent's Com. 259.

<sup>2</sup> Tied. Real Prop., sec. 682.

<sup>3</sup> 3 Washb. Real Prop. 70.

<sup>4</sup> 1 Prest. Abst. 420.

title of his grantee, and this whether he make such false representation with wilful intent to deceive, or is simply honestly mistaken about the matter.<sup>1</sup> But in order to create an estoppel it is necessary that the grantee take the land relying upon the representation which he alleges to be false.<sup>2</sup> He cannot be misled through his own lack of care, and thereafter assert an estoppel against his grantor. And while it is true that the representation may be either express or implied, no estoppel will arise merely from the execution and delivery of a deed upon a valuable consideration.<sup>3</sup> Covenants of warranty in deeds generally raise an estoppel as to after-acquired title, and this will follow whether the covenant be of general or of special warranty.<sup>4</sup> The idea meant to be conveyed here is that if A. grant lands to B. by deed in which there is a covenant of warranty, A. could not thereafter set up any title to such lands which he might acquire, as against B. He could not, for instance, rely upon a tax deed which he had purchased, to defeat the title of B.<sup>5</sup> But if the deed from A. to B. were merely one of release and without such covenants of warranty, it would operate as an estoppel only as to such title as A. had when the deed was made, and not as to any interest which he might thereafter acquire in the lands.<sup>6</sup>

**§ 473. Estoppel by deed in law — Form of conveyance, etc.**—In order that a recital may work an estoppel, such recital must be of or concerning some particular fact; and it should also be borne in mind that frequently that which would be sufficient to create an estoppel by deed in equity would fall far short of doing so in a court of law. For the court of law holds itself bound by the form of the conveyance and pays no attention to the rights of the parties except as therein expressed.

<sup>1</sup> *Stanford v. Loan Co.*, 122 Ind. 422; *Ryan v. United States*, 136 U. S. 68.

<sup>2</sup> *McCann v. Oregon, etc. Co.*, 13 Oreg. 455, 11 Pac. R. 236.

<sup>3</sup> *Dart v. Dart*, 7 Conn. 250.

<sup>4</sup> *Somes v. Skinner*, 3 Pick. 52; *Miller v. Railway Co.*, 132 U. S. 662.

<sup>5</sup> *Cole v. Raymond*, 9 Gray, 217.

<sup>6</sup> 3 Washb. 92 *et seq.*

§ 474. **Estoppel in pais.**—An estoppel *in pais* arises where a false representation is made by the vendor to the purchaser concerning the title to or the boundary lines of the property under consideration, for the purpose of influencing the purchaser with regard thereto. And such representation may be by any act, or by word of mouth, or sometimes even by silence.<sup>1</sup> The representation in order to work an estoppel must be (1) as to facts not equally within the knowledge of both parties; for if the purchaser had the same knowledge, or by the exercise of ordinary diligence might have obtained it, there will be no estoppel.<sup>2</sup> (2) The representation must have been actually relied upon to the deceit of the purchaser.<sup>3</sup> (3) The representation must have been made with the intention of influencing the conduct of the party claiming to have been misled, or have been made in such manner that he might reasonably have been expected to rely upon it.<sup>4</sup>

§ 475. **Fraud as an element of estoppel.**—The requirements set forth in the preceding section would seem to indicate that fraud is a necessary element in estoppels *in pais*. But upon investigation we find that the authorities have not uniformly so held. Some courts hold that if there are present in any given case the necessary elements with reference to the representation, it is immaterial whether the representation was made intentionally or through mistake.<sup>5</sup> Other courts take the ground that the representation must have been made either by one who *knew* it to be false, or who had no reasonable grounds for believing it to be true.<sup>6</sup> These questions, however, arise only in particular cases with regard to title, and are to be discussed in full rather as mat-

<sup>1</sup> *Baugan v. Bell*, 59 Ill. 492; *Hicks v. Cram*, 17 Vt. 449; *Noble v. Ill. Cent. Ry. Co.*, 111 Ill. 437.

<sup>2</sup> *Jewett v. Miller*, 10 N. Y. 406; *Fletcher v. Holmes*, 25 Ind. 469.

<sup>3</sup> *Hanrahan v. O'Reilly*, 102 Mass. 201; *Anderson v. Coburn*, 27 Wis. 566.

<sup>4</sup> *Andrews v. Lyon*, 11 Allen, 350; *Maple v. Kussart*, 53 Pa. St. 352.

<sup>5</sup> *Morris Canal v. Lewis*, 12 N. J. Eq. 332; *Cune v. McMichael*, 29 Ga. 312.

<sup>6</sup> *Copeland v. Copeland*, 28 Me. 539; *Boggs v. Merced Co.*, 14 Cal. 367.

ters of equity jurisprudence than as questions of real-property law.

§ 476. **Effect of estoppel on title.**—It is to be noted that a distinction with regard to the *effect* of the estoppel upon the title is made between one *in pais* and that by deed. The weight of authority and the reason of the matter hold that, where the estoppel is *in pais*, it does not create title in, or transfer it to, the person claiming the benefit of the estoppel, but *precludes* the holder of the adverse title from setting up a claim thereto as against the one in whose favor the estoppel operates. For instance, in a case where the injured person is in possession of the property he will be protected against action brought under the paramount or record title by those who are affected by the estoppel. Where the estoppel is by deed, it is maintained by high authority that the estoppel by deed supplies no title in the grantee, but has only the effect of precluding the grantor from setting up an after-acquired title in derogation of his own grant.<sup>1</sup> On the other hand, however, Mr. Washburn, among others, holds to the theory that the title of the person against whom the estoppel operates inures to the one in whose favor it is established, and so passes the after-acquired title to the grantee.<sup>2</sup> Many cases might be cited supporting both views of the matter. But from the fact that many of the states have seen fit to legislate upon the subject, it may perhaps be well said that it is recognized as a matter upon which there is no universal rule. The theory first stated above would seem, however, to be in accord with the general doctrine of estoppel, and hence to rest upon the better foundation in the law.<sup>3</sup>

§ 477. **Upon whom estoppel is binding.**—A stranger cannot be bound by an estoppel, nor can he take advantage

<sup>1</sup> Tied. Real Prop., sec. 729; Frink v. Darst, 14 Ill. 308; Buckingham v. Haun, 2 Ohio St. 551; Jackson v. Bradford, 4 Wend. 619.

<sup>2</sup> 3 Washb. Real Prop. 190, and authorities there cited.

<sup>3</sup> For discussion and citation of authorities hereon, see Tied. Real Prop., sec. 730.

thereof.<sup>1</sup> But all persons who are in privity with the maker of the false representation are bound thereby, and this whether such privity be of estate, of contract, or by blood. On the other hand, no one save the person to whom the false representation was made and those in privity with him can claim the advantage of an estoppel. To be bound by estoppel the person must be under no legal disability.<sup>2</sup> In connection with this subject the student should observe the effect of the registration or recording laws universally in force throughout this country. It may be said in reference to such laws that, in general, the grantee is bound only by what appears of record as of a date between the acquiring of the title by the grantor and the time when he offers the same for conveyance.<sup>3</sup>

#### PREScription AND LIMITATION.

§ 478. **Adverse possession.**—Titles to property which have their source or foundation in either prescription or limitation, or both, depend for their validity upon possession; that is to say, upon the possession of the parties setting up such titles. And furthermore, the possession necessary to give force to such a claim of title must be what is known in the law as *adverse*, i. e., it must be against the right of the former owner or occupant as well as against the world at large. For though, as a matter of law, possession in any form will confer certain rights upon the possessor, yet if the possession, in the eye of the law, be merely that of the true owner, as, for instance, that of his tenant, such possession, no matter how long continued, can never invest the possessor with good title to the property. Hence, in order that a title may arise from possession, such possession must be independent of that of the true owner, and of a nature

<sup>1</sup>Grand Tower Co. v. Gill, 111 Ill. 541; Falls Co. v. Worcester, 15 N. H. 452; Cate v. French, 122 Ind. 10. 452; Gouchenoner v. Mowry, 33

<sup>2</sup>Todd v. Kerr, 42 Barb. 317. Ill. 331. *Contra*, Pike v. Calvin,

<sup>3</sup>There is, however, some contention on this proposition. See Great 29 Me. 183; Wilson v. Smith, 52 Hun, 171.

incompatible with the claim of the owner, and this is termed adverse possession.

§ 479. **Prescription.**—Strictly speaking, the term *prescription* is applicable only to incorporeal hereditaments,<sup>1</sup> but it is most convenient to treat it in connection with *limitation*, as the incidents of the two are very like in many particulars. In the first place, as set forth in the preceding section, both prescription and limitation are dependent for their validity upon possession, and in each case the possession must be that of him who claims title by virtue thereof. Again, it is requisite in both cases that this possession be coupled with lapse of time in order to complete the title, and herein we find the chief distinguishing feature between prescription and limitation. In the former, the common law fixes what length of enjoyment of an incorporeal hereditament, like a right of way, for instance, shall be deemed sufficient evidence of an ownership of the right; while as to the latter, being land, the period is fixed by statute beyond which no one may set up a title adverse to the presumed title of him who has for that length of time enjoyed the uninterrupted possession of the same, and is called a limitation.<sup>2</sup>

§ 480. **Requisites of title by prescription.**—At an early day the theory of prescription was that the right claimed must have been enjoyed beyond the memory of man; but this standard being difficult of proof, the custom arose of granting the prescription on the presumption of *a deed* having been given and lost, in cases where enjoyment for a sufficient length of time was shown.<sup>3</sup> But latterly, in the United States, grants of incorporeal hereditaments are presumed upon proof of an adverse enjoyment for twenty years, or for the period of time fixed by the statute in the several states as the limitation in respect to lands themselves.<sup>4</sup>

§ 481. **Nature of enjoyment requisite.**—To the enjoyment of the benefits conferred by such presumption, it

<sup>1</sup> Crabb, Real Prop. 1039.

<sup>4</sup> 3 Washb. Real Prop. 52; Arnold

<sup>2</sup> 3 Washb. Real Prop. 51.

v. Foote, 12 Wend. 330.

<sup>3</sup> 2 Greenl. Ev., secs. 538, 539.

is, however, requisite that the possession be shown to have continued a sufficient length of time, that it was adverse, under a claim of right, exclusive, continuous and uninterrupted, open and notorious, and that the owner was in position, as a matter of law, to put an end to such enjoyment if the same was not well founded.<sup>1</sup>

§ 482. **Statutory enactments.**—In passing statutes with reference to limitations, many of the states have made provisions therein covering incorporeal hereditaments, and in others by decisions of the courts the same length of enjoyment as to lands is held applicable to such hereditaments. The term of time requisite to raise a right by prescription, therefore, has lost much of its importance in the practical working of the modern rule of presumption as to grant.<sup>2</sup> But the distinction as to title by prescription to incorporeal hereditaments is still a proper one.

§ 483. **Summary.**—Finally, we may say that this doctrine of presuming grants was originally adopted for the purpose of quieting title and giving effect in law to long-continued possession, and it is upon the theory of a grant presumed that all titles by prescription rest. Such grant being so presumed when the requisite time of enjoyment, together with the extent of the use of which the grant is claimed, are shown with legal sufficiency, when once properly established by competent proof, prescription does not simply raise a presumption in favor of the party in enjoyment, but forms a good and valid title to the thing enjoyed.<sup>3</sup>

§ 484. **Limitation.**—Passing now from the title to incorporeal hereditaments to that of lands, we find that the rules of limitation in respect thereto operate to extinguish or cut off *the remedy* of the true owner, not to confer upon the one in enjoyment the estate which such owner had;<sup>4</sup> and that, beyond what has already been said regarding prescription, the most important matter in connection with

<sup>1</sup> Washb. Easements (3d ed.), pp. 111, 130 *et seq.*; Coolidge v. Larned, 8 Pick. 508.

<sup>2</sup> 3 Washb. Real Prop. 53.

<sup>3</sup> 3 Kent's Com. 445.

<sup>4</sup> 3 Washb. Real Prop. 52.



limitation is that of adverse possession. We have seen that at the common law and by statute certain periods of years are fixed after the lapse of which even the true owner has no remedy to recover his lands in the occupation of another under certain circumstances and conditions. The language generally made use of in the statutes provides in effect that no action can be maintained unless the same be commenced within a certain number of years "after the right of entry accrues."

§ 485. **Adverse possession.**—This phrase implies seisin in the person who has the right to make the entry; but, as we have seen, seisin is of two kinds, viz., *in law* and *in fact*, and when of the latter kind it imports possession as well—that is, actual possession. The former excludes the idea of actual possession and expresses merely the right "to enter"—that is, to take possession by virtue of the right. So, if one take possession of land of which another is seised in law, the seisin, even in law, of such person is lost, and he has left merely this right of entry enforceable by a suit at law.<sup>1</sup> But every wrongful dispossession, *i. e.*, one not supported by a good title, does not amount to a disseisin; for in order that it may have and continue that effect, the possession thus acquired must be actual or constructive, open, notorious, distinct and exclusive, hostile or adverse.<sup>2</sup> And when we speak of title by adverse possession, we include all these elements; for, when so taken together, they form the basis for a claim of title which, if undisturbed for the requisite period of time, will become available to the disseisor because the law affords the party disseised no remedy under such circumstances.

§ 486. **Consideration of these elements.**—The possession necessary to the creation of title by adverse possession may be either *actual* or *constructive*. If one obtain a deed to premises he is said to be in constructive possession, though he has made no entry upon the land; but such pos-

<sup>1</sup> Preston, Abst. 284.

McCormick, 113 Ill. 538; Creekmur

<sup>2</sup> 4 Kent's Com. 488; Flaherty v. v. Creekmur, 75 Va. 430.

session alone is not sufficient to work a disseisin — there must be an actual occupation of the land to some extent.<sup>1</sup> But if one be in constructive possession of all the land claimed, under “color of title,”<sup>2</sup> entry on any part thereof will constitute a sufficient possession of the whole.<sup>3</sup> Nor is it necessary that the disseisor be himself in possession; that of his agent, tenant or other legal representative will be sufficient. So also one who claims title by adverse possession may show that the necessary possession was held by one under and through whom he claims. The entire matter of title by adverse possession being to a great extent regulated by statutory enactments, the student should not fail in every case to consult them.

**§ 487. Acts visible, notorious, etc.—What constitute.** No particular act or acts can be said as a matter of law to constitute that visible or notorious possession which the law requires. But it may be said that the acts must be of such a nature as to apprise the world at large, and especially the true owner, of the state of affairs. For if the acts done are not of such character that the owner knows, or by the exercise of ordinary diligence might know, of the possession of the disseisor, the statute would never run against him to bar his right of action.<sup>4</sup>

**§ 488. Distinct and exclusive possession.**—It is a well settled rule of law that a joint possession, even though adverse, will never amount to a disseisin. The owner must be denied access to the premises and treated, if he come thereupon, as a trespasser, or as one there without special right.<sup>5</sup> As a matter of course, the owner may treat the in-

<sup>1</sup> *Denham v. Holeman*, 26 Ga. 182, 71 Am. Dec. 193; *Ambrose v. Raly*, 58 Ill. 506. instrument is not material. *Stumpf v. Osterhage*, 111 Ill. 82.

<sup>3</sup> *Barger v. Hobbs*, 67 Ill. 592.

<sup>2</sup> By “color of title” is meant some instrument in writing, as a will or deed, which purports to convey a title. In the absence of actual fraud, the validity of such

<sup>4</sup> *Samuel v. Barrowscale*, 104 Mass. 207; *Campau v. Dubois*, 39 Mich. 274; *Wait v. Grove* (Ky.), 12 S. W. R. 1068.

<sup>5</sup> *Turney v. Chamberlain*, 15 Ill. 271.

truder as a disseisor and bring his action of ejectment to regain possession of the premises. But if the disturbance of possession is to be treated by the owner as disseisin, he must abandon his entire possession. If there be no such distinct and exclusive possession as the law requires, there can be no disseisin, and hence no gaining of title by adverse possession.

§ 489. **Hostile and adverse.**—Akin to the requirements stated in the preceding section is the one which provides that the possession shall be hostile and adverse to the rightful owner.<sup>1</sup> Such hostile and adverse possession is made up of two elements: 1. The premises must be held under a claim of title which is adverse to that of the disseisee. 2. There must exist on the part of the disseisor an intention to resist the title of him whom he has disseised.<sup>2</sup> When the entry of him who seeks to claim by adverse possession is lawful, as, for instance, with the consent of the owner, no disseisin takes place in case the one making the entry thereafter denies the right of the owner, and the law will presume that the continued possession is subordinate to the title of the true owner.<sup>3</sup> The intention above spoken of must be evidenced by acts inconsistent with the title of the owner, and both of the requirements above set forth must concur, or the possession of the intruder will be neither hostile nor adverse.

§ 490. **What estate disseisor has, etc.**—When the acts of the intruder amount to a disseisin, this, taken together with the actual possession on his part, confers upon him a sufficient seisin to enable him to alien the estate;<sup>4</sup> and such estate will, at his death, descend to his heirs. But, while this is true, the title of the disseisor is not an absolute one in its inception, for it is liable at all times, until protected

<sup>1</sup> *Lund v. Parker*, 3 N. H. 49.

<sup>3</sup> *Rigor v. Faye*, 62 Ill. 507; *Fur-*

<sup>2</sup> *Jackson v. Birney*, 48 Ill. 203; *long v. Garrett*, 44 Wis. 111.

*Hoyne v. Osborn*, 62 Mich. 235; <sup>4</sup> *Kruse v. Willson*, 29 Ill. 233;

*Jones v. Hockman*, 12 Iowa, 108; *Haynes v. Boardman*, 119 Mass. 414.

*Russell v. Davis*, 38 Conn. 562.

by the running of the statute of limitations, to be defeated by the owner, and this may be done either by his exercising his right of entry or by recourse to his action at law.

§ 491. **Persons under disability, etc.**—Statutes of limitation do not run against persons under legal disability, and hence titles resting solely on the bar of such statutes are regarded with much suspicion.<sup>1</sup> The doctrine of estoppel, as we have seen, oftentimes assists in the perfecting of title by adverse possession, but has application generally to the establishment of certain facts incident to the title, rather than to evidence on the question of its validity.

#### ABANDONMENT.

§ 492. **Definition.**—As one may *acquire* title by possession through prescription and limitation, so one may *lose* it by an act or acts done by him which in law amount to an *abandonment* of his rights and interests in the property in question. The loss of title by this means always depends upon the acts of the owner, and not upon any presumption of the execution of an instrument of release having been made, which from lapse of time has been lost, as is the case with prescription and limitation.<sup>2</sup>

§ 493. **To what kind of property applicable.**—In common with prescription, the doctrine of abandonment, when applied strictly, has to do with incorporeal hereditaments,<sup>3</sup> for title to *lands* cannot be lost merely because the owner thereof ceases to exercise his rights with reference thereto. It is always requisite that in addition to the abandonment there must be present the element of adverse possession in order to divest the owner of his title.<sup>4</sup>

§ 494. **What acts constitute abandonment.**—As in adverse possession, so in abandonment, *intent* becomes a ma-

<sup>1</sup> For general form and effect of such statutes, see *ante*, "Involuntary Alienation."

<sup>2</sup> 3 Washb. Real Prop. 61.

<sup>3</sup> 3 Washb. Real Prop. 62 *et seq.*

<sup>4</sup> The following cases, however,

would seem to apply the doctrine of abandonment to lands: *Holmes v. Railroad Co.*, 8 Am. Law Reg. 716; *Corning v. Gould*, 16 Wend. 543; *Pickett v. Dowdall*, 2 Washb. 107.

terial element. Thus it has been held that a mere non-user of a right of way for a certain length of time is not an abandonment of the right to enjoy it.<sup>1</sup> But where the owner of a right of way not created by deed exchanged the way for another, he was held to have abandoned his easement in the former way.<sup>2</sup> Had the easement been created by deed, however, it is suggested that the holding might have been otherwise. Whenever it may be inferred as a matter of law, from the acts of the owner, that it was his intention to give up his rights and to lay no further claim thereto, such owner will lose his title as by abandonment; but when the doctrine is applied to lands, it proceeds rather upon the ground of an estoppel *in pais* than upon the theory of an abandonment.<sup>3</sup> Again, it has been considered by the courts of certain of the states that an abandonment cannot be made in favor of any particular person or individual, and that the act of abandonment must accordingly be without any intention or desire that any other particular person should thereby acquire any rights in the property.<sup>4</sup>

§ 495. Summary.—It may be properly stated that it is not *abandonment* which gives the title to lands, but the fact that possession was held by another for a sufficient length of time to allow the statute of limitations to take effect.<sup>5</sup> But in the case of incorporeal hereditaments the title may be lost to one by abandonment, though no title be thereby conferred upon any other person.<sup>6</sup> And even though the acts done in abandonment amount to a confirmation of title in another, this can only be effected when such other had a voidable or defeasible title, and cannot operate to create a new estate in the place of one which is void at law. Aban-

<sup>1</sup> McKee v. Perchment, 69 Pa. St. 349.

<sup>2</sup> Pope v. Devereau, 5 Gray, 409.

<sup>3</sup> Welland Canal v. Hathaway, 8 Wend. 840.

<sup>4</sup> Stephens v. Mansfield, 11 Cal. 363.

<sup>5</sup> 3 Washb. Real Prop. 67.

<sup>6</sup> For example, when the owner of the dominant estate abandons his right, no new title is conferred upon the owner of the servient estate; the holding of the latter is simply freed from the burden of the easement.

donment, then, is the *loss* of a title by one without transferring or creating a new one in another person; for if the acts are done with the intent to accomplish the latter purpose, it amounts to a gift or sale and not abandonment.<sup>1</sup>

#### ACCRETION.

§ 496. **Definition, etc.**—When one is the owner of lands, and portions of the soil of real estate are gradually added to the lands by deposition through the operation of natural causes, the owner of the lands acquires title to such deposits by what is termed *accretion*.<sup>2</sup> The most usual example of this mode of gaining title is found in the case of the additions made to lands lying contiguous to the larger streams and bodies of water. When deposits are thus gradually made by the action of the waters upon which the lands border, the formation thus arising is called *alluvion*. In order to come within this term the deposits must be of soil or earth of a substantial character, making a permanent addition to the land by imperceptible degrees. It frequently occurs that where a stream flows between the lands of adjacent owners, the soil will be gradually washed away from one bank and be deposited on the other, in which case the owner upon whose land the deposit is made takes title thereto by accretion. But where islands are formed in navigable streams the title thereto is in the sovereignty. In non-navigable streams, the island, under such circumstances, would become the property of him who owned that part of the bed of the stream on which it formed.<sup>3</sup>

§ 497. **Avulsion.**—As we have seen, to constitute alluvion the deposit must be gradual, in such a manner that though witnesses are able to perceive from time to time that the land has encroached upon the water line, yet that it was so done that they could not perceive the progress at the time it was being made.<sup>4</sup> But instances are not want-

<sup>1</sup> Dikes v. Miller, 24 Tex. 423.

57; Warren v. Chambers, 25 Ark.

<sup>2</sup> 3 Washb. Real Prop. 55.

120.

<sup>3</sup> Banks v. Ogden, 2 Wall. (U. S.)

43 Washb. Real Prop. 59.

ing when large quantities of soil are by some sudden action of the water taken from the land of one and deposited upon that of another. This is called *avulsion*. In such cases the owner does not lose title to the soil so deposited, unless he permits it to remain upon the land of the other until from natural causes it becomes a part thereof.<sup>1</sup>

§ 498. **Summary.**—Mr. Washburn considers alluvion as an interest appurtenant to the land in the nature of an incident of the ownership thereof, and terms the right to land thus added to the former proprietorship as a title by accretion.<sup>2</sup>

<sup>1</sup> Angell, Water-courses, sec. 60.

<sup>2</sup> 3 Washb. Real Prop. 60; Patterson v. Gelson, 23 Md. 447.

## CHAPTER XX.

### TITLE BY GRANT.

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§ 499. Origin of the term "grant."—Originally lands could be conveyed only by feoffment with livery of seisin,



and the word "grant" was made use of to denote a transfer by deed of incorporeal hereditaments. But when the necessity of making livery of seisin passed away and it became lawful and customary to alien lands by deed, this word "grant" was applied to conveyances of both corporeal and incorporeal hereditaments.<sup>1</sup>

§ 500. **Public and private grant.**—Of titles arising by or through a grant there are two kinds—title by public grant, and title by private grant. The former, which will constitute the subject of our first consideration, is the term which is applied where title is created in an individual to lands which had previously belonged to the government;<sup>2</sup> and it is to be borne in mind that with us the word "government" as here used may have reference either to the United States or to one of the several states.

§ 501. **Sources of title in the government.**—The method by which title to public lands in this country was obtained by the government may be briefly outlined as follows: In the first place there seems to have been among the Indian tribes which occupied this country at the time of its discovery and settlement, no clearly defined idea of individual ownership in lands. The only well-established rights in such property with them were based entirely on *occupancy*. Secondly, no title or interest beyond this right of occupation has ever been recognized as existing in these native tribes by the nations which took possession of and colonized this country, nor by the United States and the respective states as their successors. No seisin on the part of the Indians was recognized, and the Indian deed amounted simply to a relinquishment of the right to occupy. Such deeds became effective only when followed by an actual entry, in which case the grantee gained title by such entry and possession under claim of title.<sup>3</sup> Thirdly, the general property in and sovereignty over the soil embraced within the original English colonies was conceded to Great Britain

<sup>1</sup> 4 Kent's Com. 494; Will. R. P. 147 and 195; 2 Blk. Com. 310.

<sup>2</sup> 3 Washb. Real Prop. 181.

<sup>3</sup> 3 Washb. Real Prop. 182.

by right of discovery.<sup>1</sup> This put it within the power of that country to make gifts or grants of such lands to companies or proprietors by letters patent, and these proprietors were given certain powers of control and alienation over the lands so given them. Lands not so granted out remained to the crown. Fourthly, at the close of the Revolutionary war, by the treaty of peace, these lands, together with certain contiguous territory, became a part of the public domain, and upon the adoption of the constitution were taken in part by the federal government and in part by certain of the several states.<sup>2</sup> Thus the federal government, and in certain cases the governments of the respective states, acquired the primary title to the public domain. And it is to be observed in this connection that a state has no control over lands of the United States lying within its boundaries, until such lands have been conveyed to some individual.<sup>3</sup> But what is herein said with reference to the modes of alienation and kindred matters applies equally to the governments of the United States and to those of the respective states.

**§ 502. Conveyances of public lands — How made, etc.** The public lands of the United States can be disposed of only by authority of congress, and such authority is evidenced either by special or general act.<sup>4</sup> The general acts of this nature provide for the appointment of representatives of the government, located at convenient places, with whom the purchaser has his dealings. Upon his locating the land desired, and paying the stipulated amount, the purchaser receives what is termed a certificate of entry. Upon presentation of this document to the proper authorities, he obtains a *patent*, which is the formal deed of conveyance as provided for in the general acts above referred to.

**§ 503. Incidents of such conveyances.**— The validity of a patent cannot be attacked in collateral proceedings, and is

<sup>1</sup> *Martin v. Waddell*, 16 Pet. 367.

<sup>2</sup> *Story on Const.* 215.

<sup>3</sup> *Irvine v. Marshall*, 20 How. 558;  
*Prall v. Brown*, 3 Wis. 603.

<sup>4</sup> *Strother v. Lucas*, 12 Pet. 454.

conclusive evidence of title so long as it is not set aside in a direct proceeding instituted for that purpose. The certificate of entry by the laws of some of the states invests the purchaser with an inchoate or imperfect legal title, sufficiently good to enable him to maintain ejectment or trespass.<sup>1</sup> But the holding of the United States courts on this point is that the holder of the certificate of entry has merely an equitable and not a legal title.<sup>2</sup> The certificate of entry is assignable and will confer upon the assignee the right to demand the patent. In dealing with conveyances from the government it should be remembered that in questions of property arising between it and individuals, that construction will be applied which is most favorable to the government, nor will the doctrine of estoppel be enforced against the state, as in cases of warranty between individuals.

§ 504. **Pre-emption.**—In many instances the individual gains title to public lands by what is known generally as *pre-emption*, a method provided for in the general acts of congress, to encourage immigration and actual settlement upon public lands. As indicated above, the individual, by this mode, acquires his title in part by actual residence upon an improvement of the lands, paying for his patent thereto the minimum price fixed by law for the sale of public lands. Various acts of congress of this nature are in force, to which the attention of the student is directed for further information.<sup>3</sup>

#### TITLE BY PRIVATE GRANT.

§ 505. **Distinction between a grant and a gift.**—When we come to consider title by private grant we are at once met with the distinction between a *grant* and a *gift*. Though these terms are so often used synonymously, there is yet a marked difference in their signification which should not be disregarded by the student. The term “grant” technically

<sup>1</sup> *Forbes v. Hall*, 34 Ill. 167; *Cavender v. Smith*, 8 Iowa, 349.

<sup>2</sup> *Fletcher v. Peck*, 6 Cranch, 87.

<sup>3</sup> See 3 Washb. Real Prop. 200; U. S. Rev. Stat., secs. 2256, 2257.

had reference to a conveyance made upon some consideration, either good or valuable, and so has application primarily to the alienation of lands, tenements, or hereditaments by *deed*, that is *inter vivos*,—or between living persons. The word “gift” is indicative of a transfer of property not made upon or with regard to any consideration, solely at the will of the donor, and indeed generally without the consent or even the knowledge of the one who is to receive it. The use of this word is of course proper when one is to become the recipient of the bounty of another during the life-time of both donor and donee; but technically, when applied to transfers of real property, it is to be used in connection with wills and testaments, and is not appropriate to the alienation of lands when made between living persons.

§ 506. **Divisions of the subject.**—Title by private grant, therefore, naturally divides itself into two classes—grants by deed between living persons, and gifts by last will and testament, taking effect upon or at the death of the donor. While grants *inter vivos* preceded in point of time gifts by last will and testament, on the ground of simplicity of detail, it is here thought advisable to take up gifts by last will and testament, or, as it is generally termed, *title by devise*, before proceeding with the subject of grants by deed.

§ 507. **Origin of gifts by will.**—The feudal system, as has been explained, was essentially restrictive of the power of alienation, and especially so with regard to the disposition of lands by last will and testament. Indeed, for many years after lands became freely alienable by deed, no subject of the British sovereign was able to dispose of his lands by testamentary proceedings. This disability led to an effort on the part of land-owners to direct the course of title to their lands, upon their death, by recourse to conveyances operating under and by virtue of the statute of uses. The method pursued was to make conveyance to some person during the life-time of the testator, to be by such person holden until the death of the testator, upon or to such *uses* as the testator might by his last will direct; for the restric-

tions of the feudal system in this regard were applicable to estates of freehold alone, and the *direction of a use* was a valid act, even when manifested in a last will and testament. But the passage of the statute of uses put an end to this method of disposing of lands at the death of the owner thereof. However, within a few years after the statute of uses was enacted, there was passed what is known as the statute of wills, by the provisions of which lands became freely disposable by last will and testament, and thus there was introduced into the law a new source of ownership, upon and about which has grown up and developed the subject of Title by Devise.

§ 508. **The recognition of this species of title.**—Much valuable effort has been expended in the endeavor to satisfactorily explain the right and power of an individual to direct the disposition of his lands after his death;<sup>1</sup> but it is apprehended that to us as students of the modern law of real property, it is quite sufficient to know that such right and power do exist, and that the same are exercised and constantly upheld by the courts of all the states of our Union. The English statute of wills in its general intendment is in force throughout the United States, and in it we find sufficient source of authority for our rules of law governing the disposition of real property by last will and testament.

§ 509. **Nature and requisites of a will.**—The word “gift” is particularly applicable to those dispositions of property made by will, for therein the testator does not seek to alien the property upon any consideration, nor is a consideration at all necessary to support a devise of real property. Again, this word “devise” is never properly used except in connection with real estate. A testator *bequeaths* his personal property, and *devises* his lands or interests therein. The words “will” and “testament” are frequently made use of in conjunction, though there is no difference in the legal signification of the words. According to Mr. Bigelow, a

<sup>1</sup> See Bigelow on Wills, ch. 1.

will is a written instrument, duly executed and attested, by which a competent person makes a voluntary disposition of property in favor of another competent person, to take effect after the maker's death, and being meantime capable of revocation.<sup>1</sup>

**§ 510. Wills and deeds distinguished.**—The principal distinction between title by devise and that by deed is to be found in the rules of law applicable to the construction of the instruments creating such titles. The courts of equity have gone a long way in their endeavors to assist by construction the faulty expressions of testators unlearned in the law; and, on principles of justice, the courts of common law have followed them to a certain extent. This leniency has given rise to a general understanding on the part of the laity that the only purpose of the courts in construing a will is to ascertain and give effect to the intention of the testator, and hence that a will is an instrument to the drafting of which no technical knowledge of law is necessary. But those who have given a closer attention to the matter are aware that this view is erroneous. Courts are bound by certain rules of construction in regard to a will, just as they are when a deed is under consideration. The distinction, then, between the legal effect of a will and a deed is largely one of construction, and this matter of construction is referable primarily to the difference in the rules applicable to each of such instruments.

**§ 511. The elements of a will considered — Writing.**—To a proper understanding of the rules of construction which are made use of to ascertain the intent of the testator as a matter of law, it is quite necessary for us to consider in detail those several elements which go to make up the requisites of a valid will. And first, of the necessity of a written instrument. By the statute 29 Car. II., ch. 3, sec. 5 (commonly

<sup>1</sup> Bigelow on Wills, ch. 3. This definition is not intended to include wills simply appointing ex-  
ecutors or guardians, and nuncupative or holographic wills. These will be referred to later on.

called the Statute of Frauds), all devises of lands or tenements were required to be in writing. Legislation founded upon this statute, and containing somewhat similar provisions, is in force generally throughout the United States. The writing, as a matter of law, is therefore taken to be the final evidence of the testator's intention.<sup>1</sup> And in the absence of fraud practiced upon the testator, verbal, or even written statements, made by him with regard to the disposition of his property, will not be permitted to affect the written will. But the will may be in part written and in part printed, as upon a blank or form,<sup>2</sup> or written either with pen or pencil, upon any sort of material which is of sufficient permanency to receive and retain the writing.<sup>3</sup>

§ 512. **Execution.**—When the will is a written one, the law requires that the same shall be signed by the testator, but, unlike a deed, there need be no seal in connection with the signature. Unless the statute requires the testator to *sign his name*, he may execute the will by making any mark thereupon with the understanding and intent that such mark shall constitute his signature.<sup>4</sup> The law will recognize for this purpose the initials or the first name of the testator, or, in cases where he is unable to write, his name written by another person at his direction.<sup>5</sup> The signature of the testator should, properly, be placed at the end of the instrument, though generally it is held sufficient if it appear anywhere thereon.<sup>6</sup> In some states by statutory provision, the signature must be at the end.

§ 513. **Acknowledgment.**—The second requirement with reference to execution is that of acknowledgment, by which is meant that the testator shall inform the witnesses that

<sup>1</sup>Smith v. Smith, 54 N. J. Eq. 1; Hawker v. Chicago, etc. R. Co., 165 Ill. 561.

<sup>2</sup>Jarman on Wills, 78.

<sup>3</sup>Tomlinson's Estate, 133 Pa. St. 245.

<sup>4</sup>Higgins v. Carleton, 28 Md. 115; Robinson v. Brewster, 140 Ill. 649.

<sup>5</sup>This is statutory and not the rule in all the states. See Murray v. Hennessy, 48 Neb. 608; Fritz v. Turner, 46 N. J. Eq. 515.

<sup>6</sup>Adams v. Field, 21 Vt. 256; Watts v. Public Adm'r, 4 Wend.

168.

the signature is his; and this he may do in express words or by acts which clearly convey that meaning to the witnesses.

§ 514. **Publication.**—Thirdly, the testator must either expressly in words, or by unmistakable acts or conduct, declare the instrument to be his last will and testament, and this is termed *publication*. Publication of this nature is generally required to be made to the witnesses while all are present; and in some jurisdictions the testator is required to affix his signature in the presence of all the witnesses.

§ 515. **Attestation.**—This requirement has reference to the necessity of having a certain number of persons sign the will as witnesses to the due execution thereof. The number of such witnesses required varies in accordance with the statutory requirements of the different states. The general rule is that any person who would be a competent witness on any question of fact is a competent person to become a witness to a will, and, speaking generally, the fact that one takes an interest in the property disposed of by the will no longer disqualifies him as a witness, as was once an almost universal rule. The tendency at the present day is to regard the testimony of such a person as admissible, leaving the question of its weight or credibility to the jury. Statutory enactments very generally provide the form or requirements of the attestation clause to be attached to a will and signed by the witnesses. The requirement that this clause shall state in substance that the testator signed in the presence of all the witnesses, and that they, at his request and in his presence, and in the presence of each other, signed the will as witnesses to the due execution thereof, is practically universal. But it is also true that wills to which no attestation clause is attached will be admitted to probate when such clause is not specifically required by statute, if it can be shown that the general requirements with regard to witnessing the execution of the will were in fact complied with.<sup>1</sup>

<sup>1</sup> In re Hogan, 73 Wis. 78. These by statute, no universal rule can matters being so largely regulated be announced.



§ 516. **Competent testator.**—The class of persons who are now under such legal disability as to preclude them from making a valid will is comparatively small. At the common law neither married women nor persons under the age of twenty-one years could make a valid will of real property; but now the restriction as to the former has been entirely removed, and statutes in many instances have changed the age at which the disability of infancy in this regard is removed. Persons of unsound mind generally are not credited with testamentary capacity, yet the line of demarcation is so finely drawn that a will is not to be rejected on this ground, even though the testator was considered by those who knew him to be of unsound mind upon matters in general. To be erratic or mentally unbalanced with regard to many of the most ordinary affairs of life is not necessarily to be lacking in testamentary capacity, though as a matter of course, if the provisions of the will reflect such a state of mind on the part of the testator, it would be strong evidence of a want of such capacity.<sup>1</sup> It has been held that the testator may, from lack of mental power, be unable to transact the ordinary affairs of life, or to make a contract, and still be not lacking in testamentary capacity.<sup>2</sup> The question in each case is whether the testator, at the time of the execution of the will, was fully aware of how he desired to dispose of his property, and of the fact that he was carrying out his intentions and desires by so making his will.

§ 517. **Must be voluntary act of testator.**—In order to the validity of a last will and testament the execution thereof must have been by the free act and will of the testator. This is a matter often confounded with the power of testamentary disposition, and yet it is quite separate and apart therefrom, as viewed in the law. In the first place we may conceive of a case wherein the testator is compelled to execute the will and to publish and declare the same

<sup>1</sup> *Nicewander v. Nicewander*, 151 Ill. 156; *Sinnett v. Bowman*, 151 Ill. 146; *Kramer v. Weinert*, 81 Ala. 414;

<sup>2</sup> *Jackson v. Hardin*, 83 Mo. 175; *Meeker v. Meeker*, 74 Iowa, 352.

through bodily fear, or through fear of some injury to him consequent upon his refusal so to do. But instances of this kind are perhaps less rarely met with than those cases in which the testator is *led*, rather than driven or compelled, to make certain dispositions of his property in and by his last will and testament, by the exercise of what the law terms *undue influence*. This element must be considered as separate and apart from both forcible coercion and the lack of testamentary capacity. It will be apparent upon consideration, however, that the amount or degree of influence necessary to be exercised in any given case will depend in a large measure upon the condition of the mind of the testator.<sup>1</sup>

§ 518. *Undue influence*.—It is a matter of some difficulty in most instances to determine what acts or doings constitute undue influence, or under what circumstances it arises. It is certain that it does not consist in the exercise of force, nor does it necessarily occur in cases where the testator is under the control of the person who it is alleged has brought about the improper execution of the will. The test seems to be whether the influence was such that it did in reality take away the testator's free action in the particular instance in question.<sup>2</sup> The influence necessary to accomplish the result may be exercised in the most quiet or insidious manner, and indeed it may be well said that in the typical case the testator is quite unaware of the existence of such influence. Thus the influence exercised over the testator by his relatives, or by those with whom he has sustained relations of intimacy, is to be regarded from the standpoint of such relationship. But it is not to be understood that the mere fact that such relations have been sustained is sufficient to establish *undue influence* in any given case. But while this undue influence is not to be con-

<sup>1</sup> *Mooney v. Olsen*, 22 Kan. 69; *Gurley v. Park*, 135 Ind. 440; *In re Westcott v. Shepard*, 51 N. J. Eq. 318. *re Nelson*, 39 Minn. 218, and *Ormsby v. Webb*, 134 U. S. 47.

<sup>2</sup> *Bigelow on Wills*, p. 83, citing

sidered as being exercised by any person on account of the relations he or she may sustain to the testator, it is equally to be understood that such influence may be exercised by any one, without regard to the nature of the relations he or she may have sustained with reference to the testator. All of the circumstances must be taken into consideration in arriving at a determination on the question of the validity of a will. But the fact that the provisions of the will are strongly in favor of certain persons, known to have exercised great influence generally over the mind of the testator, as, for instance, his solicitor, a trusted friend, a favorite son or daughter, etc., will have great weight in deciding the question under consideration.

**§ 519. What property may be disposed of by will.**—A testator may dispose of any and all property which would otherwise at his death go to his heirs or to his personal representatives,<sup>1</sup> and this even where he is only the legal or the beneficial owner, or where he has both the legal and the equitable title. The true test seems to be, what property is descendible? So even a mere possessory right in real estate, or a right of entry after disseisin, may be made the subject of a devise.

**§ 520. Operative as to what property.**—At the early law the will was operative only as to such property as the testator had at the date of the making thereof,<sup>2</sup> even though he especially directed the disposition of after-acquired interests. But the view of wills which regarded them as a present conveyance, taking effect only at or upon the date of their execution, has been superseded by the modern rule that a will speaks or takes effect from the death of the testator, and so enables the testator to thus dispose of after-acquired interests as freely and to the same extent as he may those property rights of which he is possessed at the date of the making of the will. But as a matter of course

<sup>1</sup> Jarman on Wills, 48.

<sup>2</sup> *George v. Green*, 13 N. H. 521.

there must be an intent to make such disposition expressed upon the face of the will.<sup>1</sup>

§ 521. **Necessity of a competent beneficiary.**— That the provisions of a will with reference to the disposition of real estate shall be effective, it is also necessary that the person in whom the title is to thereby vest, should be such an one as the law will permit to enjoy the ownership of real property. A very common statutory enactment prohibits the taking of such property generally by corporations, and by trusts in the nature of corporations, for the reasons supporting the adoption of the ancient statutes of mortmain are still applicable in a large measure to such cases. The courts of equity have, however, greatly aided the power of corporations to take as devisees, where the property given them was upon charitable uses, which is so common a provision in wills. But, as a general rule, the corporation can take only a limited amount of real estate either by will or by deed. Aliens are also under statutory disability to a certain extent in this regard.<sup>2</sup> So, also, in most states the witnesses to a will, if they qualify in court as such, are incapable of taking.<sup>3</sup>

§ 522. **At what time a will takes effect.**— During the life-time of the testator his will creates no rights in the devisee. It is of no force and effect as an instrument of conveyance until it appears upon the death of the testator as his last will and testament. The precise form of the instrument appears to be of but little moment, if it can be shown that the actual intention of the maker was to effect a *post-mortem* disposition of his property.<sup>4</sup> Accordingly an instrument described on its face as a deed may upon proper showing be admitted to probate as a will. And two separate instruments, one taken alone being a deed and the

<sup>1</sup> Jarman on Wills, 62.

<sup>4</sup> Massey v. Huntington, 118 Ill.

<sup>2</sup> Phillips v. Moon, 100 U. S. 208. 80; Bristol v. Bristol, 53 Conn. 63;

<sup>3</sup> The student is referred to the Cover v. Stem, 67 Md. 449. various statutes on this subject.

other a will, may be treated as one testamentary instrument.<sup>1</sup>

§ 523. **A will must be revocable.**—As a corollary to the proposition that a will does not take effect until the death of the testator, it must during his life-time be subject to revocation at his instance. For if the instrument in question creates a present right in another person it cannot of itself be a will. But one may bind himself to make a devise in favor of another, and a failure so to do will then amount to a breach of contract, and the courts will enforce performance of the thing promised out of the estate of the party so bound, after his death.<sup>2</sup>

§ 524. **How revocation may be made.**—The revocation of a will may be effected either expressly,<sup>3</sup> as by the making of a codicil or of a later will, or by implication as a matter of law. At common law, and in some states by statute, if a woman makes a will and afterward marries, the will is thereby revoked.<sup>4</sup> And it is quite generally our law that subsequent marriage revokes a will made by an unmarried man, though such is not the common-law rule. In some states the birth of a child revokes the will, as at common law. The effect of divorce, and indeed each of the matters just referred to, are so far regulated by statute as to be incapable of proper treatment here. The testator may revoke his will by destroying the same, as by burning or tearing it, or even attempting so to do, if it was his intention to prevent it ever becoming operative.<sup>5</sup> But he cannot revoke by declaring such intention orally, or by mere spoken directions to another to destroy the will.<sup>6</sup> Having considered somewhat the elements that go to make up a valid will, we shall now proceed to examine the effect which is given to such instru-

<sup>1</sup> Bigelow on Wills, 106.

<sup>4</sup> *Crum v. Sawyer*, 132 Ill. 443.

<sup>2</sup> *Gould v. Mansfield*, 103 Mass. 408; *Bird v. Pope*, 73 Mich. 89; Bigelow on Wills, 110.

<sup>5</sup> *Blanchard v. Blanchard*, 32 Vt. 62; *Gay v. Gay*, 60 Iowa, 415.

<sup>3</sup> *Gordon v. Whitlock*, 92 Va. 723; Jarman on Wills, 134.

<sup>6</sup> *Boyd v. Cook*, 3 Leigh, 32; *Lansing v. Haynes*, 95 Mich. 19; *Mundy v. Mundy*, 15 N. J. Eq. 290.

ments by the rules of construction as applied thereto, for upon this point depends the value of a will as an instrument for the creation or transfer of title.

§ 525. **Construction.**—The primary rule applicable to the construction of a will is that the instrument, or rather the wording thereof, shall be so taken that effect may be given to the intention of the testator. The statement of this rule implies that in many cases the testator has for some reason failed to clearly express his wishes and directions with reference to the disposition of his estate. When such a case arises the instrument is said to be open to construction; that is, it must be submitted to the court in order that the true legal effect of the bequests and devises therein made may be determined as a matter of law.

§ 526. **Effect of the use of technical words.**—But it sometimes happens that the testator has, perhaps inadvertently, made use of certain words or expressions, which in the law have a certain and definite signification, as, for instance, the use of the words “his heirs” in connection with a gift of real property; and it is to be observed in such cases that the law will not vary the meaning or effect of such words. It will not permit the testator to import a new signification into the law, but will refuse to place any other or different meaning upon such words than that given them in the law generally.

§ 527. **Effect of ambiguous words, etc.**—But the mere fact that the testator has sought to express his intentions in ungrammatical terms or in ambiguous words will not, of necessity, prevent the court from giving effect thereto. For it has been held by high authority that if by the use of plain and unambiguous words a testator has made his meaning clear and certain, his will expounds itself, and all the court can do, or has power to do, is to give effect to his purposes, and in such case it matters not that the result is absurd or nonsensical.<sup>1</sup>

<sup>1</sup> Marshall v. Hadley, 50 N. J. Eq. 547.

§ 528. **Effect of context.**—Construction may have to do with intention improperly or insufficiently expressed, or it may deal with particular words and phrases of the will, the meaning of which is rendered uncertain by the context, or by circumstances brought out in connection with the will itself. As it is usually stated, construction is concerned either with ellipsis of intention, or with verbal ellipsis. Construction therefore works out its purpose, (1) by interpretation, (2) by means of rules, or (3) by both methods together.<sup>1</sup>

§ 529. **These methods considered.**—The first method is known as the primary method of construction, and accomplishes its purpose, if at all, by properly interpreting the intention of the testator as the same is to be gleaned from a full consideration of the language of the entire will. The second, or secondary, method proceeds upon the theory that the testator has imperfectly or incompletely expressed his intentions, wishes and desires, and the law steps in to effectuate his intentions by completing the idea which in its judgment the testator had in mind. And hereto are applied those certain rules of construction established by the law as being more likely to bring about justice and uniformity than would the leaving thereof to uncertainty or to the caprice of any particular court.<sup>2</sup>

§ 530. **As to deeds.**—It will be apparent from what has been said that the law applicable to wills differs in this important matter of construction from that applicable to deeds. A party to a deed is bound by the *letter* of the law, while the testator receives the benefit of the spirit thereof. This becomes of importance when the legal effect of a gift is under consideration. The question frequently concerns both the quality and the quantity of estates and so falls within the domain of real-property law.

§ 531. **Effect of title by devise.**—In common with title by descent and by deed, the legality and effect of devises are

<sup>1</sup> Bigelow on Wills, 154.

<sup>2</sup> *Fabens v. Fabens*, 141 Mass. 395.

governed by the law of the place where the land devised is situated.<sup>1</sup> But the interpretation of the will is made in accordance with the laws of the place of residence of the testator. While it is the rule that a will speaks, or becomes operative as an instrument of conveyance, only at, or upon, the death of the testator, yet it is often necessary, in endeavoring to ascertain the intention of the testator, to bear in mind the conditions existing at the date of the execution of the will. It seems hardly requisite to call attention to the fact that, no matter what may be the provisions of the will to the contrary, the devisee takes the property thereunder subject to the debts and obligations of the testator. When the person named in the will as devisee dies prior to the testator, the devise is said to *lapse*, that is, it comes to an end, because in such case there is no one to take. Statutes, however, have very generally made provisions regulating the matter of lapsed legacies and devises.

§ 532. **Probate — Proof of title, etc.**— By statute, in this country, wills must be regularly proven and made a matter of record in order that the title of the devisee may be established. For, until this step is taken, the public at large is not bound to recognize the rights of him who takes under a will. The methods of procedure, the proper court in which to offer the will, etc., are consequently matters regulated by statutory provisions.

<sup>1</sup> Richard v. Miller, 62 Ill. 417; Swearingen v. Morris, 14 Ohio St. 424.



## CHAPTER XXI.

### TITLE BY PRIVATE GRANT.

- § 533. Private grant by deed.
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§ 533. **Private grant by deed.**— Title by public grant and by devise having received our attention, we come next to that division of title by private grant in which is included all modes of alienation between individuals wherein both parties to the transaction are living persons. When a transfer of landed property is made under these circumstances, it is termed in the law a conveyance *inter vivos*, and is effectuated by the execution and delivery of an instrument under seal, that is, of a deed.<sup>1</sup> But deeds were not the earliest means made use of to transfer the title to real property, for it appears that in the ancient law it was necessary in every

case that there be what the law considered a public delivery of the land by the vendor to the purchaser.<sup>1</sup> This was known as livery of seisin and was the proper mode of alienating a freehold. But when lands came to lie in grant, as well as in livery, a form of deed came into use for this purpose, the operation of which is now designated as a common-law conveyance. Such a conveyance directly and by its own force and effect takes the legal title from the grantor and confers it upon the grantee.

§ 534. **Effect of statute of uses.**—The statute of uses, as we have seen, introduced a new mode of transferring the title to real property, and thus arose a separate class of conveyances, operating under and by virtue of this statute, and quite independent of the common-law conveyance.<sup>2</sup>

§ 535. **Statutory conveyances.**—Then again the body of the more recent law contains many legislative enactments providing new and somewhat different forms and methods for the alienation of lands. Hence, there are for our consideration three principal classes of conveyances *inter vivos*, viz: the common-law conveyance, conveyances operating under the statute of uses, and the modern or statutory conveyances. As being the earliest in point of time, and largely the foundation of the others, the common-law conveyance is of the greatest importance, and will first receive our attention.

§ 536. **Incidents, etc., of common-law conveyances.**—Common-law conveyances are divided into two classes: primary and secondary. The first are such as confer upon one who theretofore had no interest in the land some interest or estate therein. The second are made use of when it is desired to enlarge, restrain, transfer or extinguish the estate or interest which the grantee already has in the lands. The first invests a stranger with title, the second adds to, abridges, or brings to an end, an estate already held in the

<sup>1</sup> 2 Blk. Com. 310.

<sup>2</sup> Spence, Eq. Jur. 452.

property.<sup>1</sup> Of primary conveyances there appear to be four principal kinds: feoffment, grant, lease, and partition.

§ 537. **Feoffment.**—A feoffment is the most ancient method of conveyance, and is the gift of any corporeal hereditament by one person to another.<sup>2</sup> The word in its original meaning signifies the *gift* of a feud, but gradually the word “enfeoff,” to *grant* a feud, came into general use. It is the proper mode of conveying a freehold, though it seems to serve equally well for the conveyance of any other estate.<sup>3</sup> Feoffment operated upon the *possession* without any regard to the estate or interest of the feoffor, and, so long as the feoffor had possession, the feoffment passed a fee and worked a disseisin of the freehold.<sup>4</sup> The peculiar operation of this kind of common-law conveyance was due to the fact that whenever it was made use of it was necessary not only that there should be given the deed of feoffment, but also that the deed should be followed by that ceremony known as the *livery of seisin*.<sup>5</sup> This amounted to an actual delivery of possession to the feoffee by the feoffor and invested him with a freehold estate in the lands. By statute in England, and generally throughout this country, a feoffment has been deprived of the peculiar power just above outlined, and so restricted to the conveyance of the estate which the grantor had in the land.

§ 538. **Effect of possession upon title, etc.**—The tortious operation of a feoffment was probably due to the desire, or policy of the law, which seems to have existed then as now, that all transfers of landed property should be open and notorious, and thus susceptible of ready proof when the title of any person was called in question. The foundation of every title at that early day was actual possession,<sup>6</sup> and this, as a matter of course, the feoffor must have had in

<sup>1</sup> 2 Blk. Com. 309.

<sup>5</sup> 2 Blk. Com. 310; Co. Lit. 48b.

<sup>2</sup> 2 Blk. Com. 310.

<sup>6</sup> Digby, Hist. Real Prop., ch. III,

<sup>3</sup> 2 Blk. Com. 310.

sec. 12.

<sup>4</sup> Digby, Hist. Real Prop., ch. III,  
sec. 12 (3); 4 Kent's Com. 480.

order to perform the ceremony of livery, and it appears that the law did not go back of the fact of this possession on questions of title. In the modern law, registration acts and similar legislation have rendered unnecessary the livery of seisin, and it has but little place in our law of to-day. But, in form, the old deed of feoffment is still largely in use, and, where not specifically abolished by statute, is a proper and sufficient method for conveying a freehold estate.<sup>1</sup> "Nothing," says Kent, "can be more concise and more perfect in its parts than the ancient charter of feoffments."<sup>2</sup> Under our authorities the feoffment now having no tortious operation, the feoffee will come into only such estate and with the same and no greater right therein than had the feoffor, so that no disseisin now takes place in such cases.

§ 539. *Grant*.—When at common law it was desired to make a transfer of incorporeal hereditaments, a form of conveyance known as a *grant* was resorted to. It was from the nature of the property impossible in such cases to make livery of seisin, and in consequence the transaction was completed by the giving of a deed only. In form this deed is practically the same as the deed of feoffment, but, as we have seen, a deed, no matter in what form, was insufficient to convey corporeal hereditaments, and hence at common law that kind of property could not be aliened by grant;<sup>3</sup> and because there was not present in the case of a grant that sort of possession upon which the law laid so much stress in feoffments, a *grant* conveyed only the estate which the grantor really had in the property. It had no tortious effect upon the interests of any other person.<sup>4</sup> But the distinction in this regard has now been abolished, and corporeal hereditaments as well as incorporeal are said to "lie in grant," that is, to be alienable by deed alone. The words "have given and granted," common both to feoffments and grants, are now sufficient to effectuate the transfer of either

<sup>1</sup> 3 Wash. Real Prop. 360.

<sup>2</sup> 4 Kent's Com. 480.

<sup>3</sup> 2 Blk. Com. 310.

<sup>4</sup> 4 Kent's Com. 353.

corporeal or incorporeal hereditaments.<sup>1</sup> Conveyances at the present day, operative through the common law, are generally deeds of grant.

§ 540. **Lease.**—The term *lease*, as we now make use of it, indicates an instrument made use of for the conveyance of some estate less than a freehold. But such was not the sense in which the word was used in the common law. There it was properly a conveyance of a particular estate in lands where there was a reversion left to the grantor.<sup>2</sup> And such particular estate might have been of freehold, as, for life, or less than freehold, as an estate for years. When employed now it indicates something more than a conveyance, for it embraces the terms and conditions upon the performance of which the lessee gains the right to the possession of the lands for a term of years. Being an estate less than freehold, the lessee or tenant for years is merely *possessed*, not *seised*, of the lands, and so until possession is taken he has only a *chose in action*, called an *interesse termini*, the estate for years not being created as such until the lessee enters into his possession.

§ 541. **Partition.**—Partition is, properly speaking, of two kinds: *voluntary* and *involuntary*. In the former it differs in form and effect very little, if at all, from the other modes of conveyances, feoffment and grant. It affords the means of effecting a division between persons who have joint estates in lands, and of changing their joint ownership into estates in severalty. It accomplishes this purpose by ordinary deeds of indenture, conveying to each interested party his share in severalty. When a partition cannot be agreed upon by the parties thereto, recourse may be had to equity, and the division effected by and in accordance with a decree of the court.

§ 542. **Secondary conveyances—Release, etc.**—Of the secondary conveyances we may note the following: Release, confirmation and surrender. A release is a discharge or a

<sup>1</sup> Washb. Real Prop. 352.

<sup>2</sup> 2 Blk. Com. 317.

conveyance of a man's right in lands or tenements to another who hath some former estate in possession therein.<sup>1</sup> The words appropriate for use in such instruments are "remised, released and forever quitclaimed." A release is effective: (1) For the purpose of enlarging an estate; as, for instance, where a remainderman releases his expectancy in fee to the owner of the particular estate, thus putting an end to the remainder, and investing the tenant of the particular estate with a present estate in fee. (2) For the purpose of passing or conveying an estate; as, for instance, where one of two joint tenants releases all his right to the other, and such other thus acquires the entire estate. (3) For the purpose of conveying or passing a right; as where a disseisee releases all his right, title and interest to his disseisor, and thus changes his estate from one by tortious act to one of right. (4) By way of extinguishment; as where a reversioner releases to the grantee of his tenant for life and thus puts an end to the reversion. (5) By way of entry and feoffment, as in a case where there are two joint disseisors, and the disseisee releases to one of them, the one receiving such release will be sole seised and in virtue thereof may oust his co-disseisor. The legal effect of a release of this nature is the same as if the disseisee had regained his seisin by making an entry, and had then enfeoffed one of the disseisors of the land. It will be seen that in some of the cases above outlined, livery was not, and in others was, necessary, for in some the releasee already had the seisin, while in others it was necessary to invest him with it.

§ 543. Confirmation.—A confirmation is a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased.<sup>2</sup> The operative words in this kind of conveyance are, "have given, granted, ratified, approved and confirmed." Thus a confirmation is a proper conveyance when one having aliened for a particular purpose, voidable at his

<sup>1</sup> 2 Blk. Com. 324.

<sup>2</sup> 2 Blk. Com. 325; 1 Inst. 295.

option, thereafter desires to make the estate of his grantee certain and unavoidable.

§ 544. **Surrender.**—A surrender is a conveyance made use of to pass a lesser estate into a greater, and is in this regard the opposite of a release. It is defined as a yielding up of an “estate for life or years to him who hath the immediate reversion or remainder.”<sup>1</sup> The operative words are, “hath surrendered, granted and yielded up.” To be effective as a surrender, there must be present in every case a privity of estate between the parties thereto and a merging of the lesser in the greater estate. Surrenders, moreover, are of two kinds: *in fact* and *in law*; the first by formal instrument of surrender, or by any form of words without the necessary writing, where a clear intention to surrender appears from the acts of the tenant of the particular estate;<sup>2</sup> the second, by the acceptance of a new lease from the lessor for the whole or a part of the time embraced in the former one, because such an act necessarily implies a determination and surrender of the former lease.<sup>3</sup>

§ 545. **Conveyances operating through the statute of uses.**—We discussed in a former chapter the enactment and operation of the statute of uses, and it was there stated that a conveyance of lands might be made under the provisions of this statute without the necessity of livery of seisin or of observing the forms and requisites prescribed by the common law. This statute being still in force, both in substance and effect, we have at the present day, in addition to those operative by common law, conveyances under the statute of uses.

§ 546. **Mode of operation, etc.**—Uses are raised without transmutation of possession where the legal owner of lands binds himself to hold such lands for the use of some other person.<sup>4</sup> There are two methods generally employed for

<sup>1</sup> 2 Blk. Com. 326.

<sup>2</sup> 2 Stark. Ev. 342.

<sup>3</sup> *Schieffelin v. Carpenter*, 15

Wend. (N. Y.) 405.

<sup>4</sup> Digby, *Hist. Real Prop.*, ch. VII,  
§ 2.

the purpose of creating a use which the statute will execute. The first of these is known as a covenant to stand seised to uses, and is effective in those cases where a transfer of lands is to be made between persons standing in close relationship one to another, either by blood or by marriage, or, in other words, when the consideration upon which the transfer is based is a *good* and not a *valuable* one. This sort of arrangement is not regarded as a voluntary agreement of the nature that equity refuses to enforce,<sup>1</sup> and hence the statute executes the use. For example, if A. covenants to stand seised to the use of B., his eldest son, and his heirs, B., by force of the statute, takes an estate in fee-simple in precisely the same way as if that estate had been conveyed to him by feoffment at common law.<sup>2</sup>

§ 547. *Bargain and sale*.—The second method of raising such a use is called a *bargain and sale*, and is employed when the agreement that the estate or interest in the land is to be conveyed is supported by a *valuable* consideration. The instrument is in the nature of a contract in which the bargainor, for a valuable consideration, bargains and sells the land to the bargainee. But while the law requires in these cases a valuable consideration, it will not inquire into the *adequacy* thereof. When it is made to appear that such a contract has been made, equity raises a use in favor of the bargainee which the statute at once executes, thus transferring to him the estate so bargained for. No particular form of contract or deed is required to effect the object of these proceedings.<sup>3</sup>

§ 548. *Statutes of enrollment*.—Neither of the methods for raising a use, just above outlined, required any particular ceremony, or any open and notorious act to be done, and were in general conducted without the knowledge of any other persons than those directly interested therein. This led to results never intended by the statute of uses,

<sup>1</sup> Leake, Land Law, 108.

<sup>3</sup> Trafton v. Hawes, 102 Mass. 533;

<sup>2</sup> 2 Saunders on Uses, 82; Co. Litt. 1 Prest. Conv. 38.



one of the avowed objects of which was to give publicity to the transfer of landed property. Accordingly a statute was passed in the same year (1535) requiring the enrollment of such instruments in certain public offices. With us, our registration acts accomplish the purpose so far as publicity is concerned, and the statute just referred to was never in force in this country.<sup>1</sup>

**§ 549. Lease and release.**—The necessity of enrollment in England was soon evaded by a method of conveyance known as a *lease and release*. The statute of enrollments extended its provisions only to estates of inheritance or freehold, and so had no effect upon a bargain and sale of a term of years created out of a freehold. Hence if A., tenant in fee, bargained and sold his lands to B. for one year, there was no necessity for enrollment. By the decision of the courts<sup>2</sup> it was held that a bargain and sale for a term of years gave to the lessee, by force of the words of the statute of uses, possession of his term as if he had actually entered on the land, at least to such an extent as to render him capable of taking by a simple deed a release of the reversion. For example, on to-day, A., tenant in fee, bargains and sells his land to B. for one year, and to-morrow executes a release of the reversion in fee to B. and his heirs. B. being in possession, as soon as the release is executed the smaller and the larger estate would merge in him and he would become tenant in fee in possession.<sup>3</sup>

**§ 550. The use of these forms in the United States.**<sup>4</sup>—Bargain and sale is the mode of conveyance most prevalent in the United States, except where there are conveyances of special statutory form, and indeed many of these, when

<sup>1</sup> Jackson v. Wood, 12 Johns. 74.

<sup>2</sup>In the eighteenth year of the reign of James I.

<sup>3</sup>Digby, Hist. Real Prop., ch. VII, sec. 3.

<sup>4</sup>That method of alienation known in the English law as Fine

and Recovery never found great favor in our law, and is of so little importance at the present day that we have not discussed it here. For its explanation, see 2 Blk. Com. 348-357, and 4 Kent's Com. 497.

traced to their source, are found to operate upon the principles of bargain and sale.<sup>1</sup>

*Lease and release* was formerly much in use with us, but it was cumbersome and somewhat inconvenient, requiring, as it did, two deeds in every case. Nor was it ever our law that a *bargain and sale* was of necessity to be enrolled or filed for record; hence, there being no absolute requirement for the *lease and release*, it gradually fell into disuse and was succeeded by the method of *bargain and sale*.<sup>2</sup>

§ 551. **Modern statutory conveyances.**— One of the rules of construction applicable to statutory enactments is that, unless especially worded to that effect, such enactments do not render invalid the provisions of the common law with regard to the subject in question. Applying this rule to the matter of statutory conveyances, we find that in general, while in many states the statutes provide certain forms for the conveyance of landed property, the effect thereof is not to render the old common-law forms, the bargain and sale, or the lease and release, ineffectual as modes of alienation.<sup>3</sup> The purpose of such statutory enactments is to provide simpler forms and methods to accomplish the same purpose.<sup>4</sup> The statute of frauds, so generally in force with us, requires that all such conveyances shall be made by an instrument in writing, and in the majority of the states such instrument is further required to be under seal in order to pass the *legal* title.

§ 552. **Quitclaim deeds.**— An instrument of this nature is peculiar, in that it may operate either as a primary or as a secondary conveyance.<sup>5</sup> It is quite as effectual as any other deed for conveying title to a stranger, and will transmit to

<sup>1</sup> It is to be noted that bargain and sale by deed can create an estate *in futuro*. *Rogers v. Eagle F. Ins. Co.*, 9 Wend. 611; *Seals v. Price*, 83 Ga. 587.

<sup>2</sup> 4 Kent's Com. 494-496.

<sup>3</sup> 3 Washb. on Real Prop. 360.

<sup>4</sup> For instance, in Illinois it is held that the words "convey and warrant," made use of in the statutory form of deed, imply full and complete covenants of warranty.

<sup>5</sup> There are exceptions to this rule in some states.

such a person all the right, title and interest which the grantor has in the lands at the date of its execution and delivery. But as it contains no covenants warranting the title, the grantee is without remedy against the grantor in case the same prove defective.<sup>1</sup> As secondary conveyances, quitclaim deeds have largely taken the place of the old common-law release in our every-day practice, and are available in all cases where the release might have been used. No particular form of words is necessary in making a deed of this nature, providing that some words indicating the intention of making a transfer are present.<sup>2</sup>

§ 553. **Construction of deeds.**—A deed will operate as that mode of conveyance which best carries out the intention of the parties when clearly manifested therein, provided there are sufficient operative words to bring the deed within that class of conveyances.<sup>3</sup> Thus, an instrument containing the words “give, grant, bargain and sell” may operate either as a bargain and sale, or as a common-law deed. The utility of this rule arises from the fact that deeds would otherwise sometimes fail for inaccuracy of expression with regard to the operative words. It is always the policy of the law to uphold and enforce this class of instruments, rather than to hold them void and of no effect.

<sup>1</sup>Sherwood v. Barlow, 19 Conn. 471; May v. Le Clair, 11 Wall. 232.

<sup>2</sup>Fash v. Blake, 38 Ill. 367.

<sup>3</sup>Tied. on Real Prop., sec. 782.

## CHAPTER XXII.

### CONVEYANCES INTER VIVOS.

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§ 554. **Deeds.**—The transmutation of the legal title to lands between living persons is at the present day accomplished by the making, executing and delivery of a *deed*. A deed is a writing sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things

therein contained.<sup>1</sup> Though, as we have seen, certain of the formalities required in the ancient law with regard to deeds may now be omitted, yet it is time well spent to consider the essentials of the old common-law deed and to familiarize ourselves with its form and contents.

§ 555. **Deeds poll and indentures.**— We find, in the first place, that deeds are of two sorts — *deeds poll* and *indentures*. The former is not, strictly speaking, an agreement between two or more persons, but is a deed which contains the language, signature and seal of the grantor only. It should be observed in passing, however, that instruments of this sort may contain agreements which will become binding upon the grantee on his acceptance of the deed.<sup>2</sup> Our ordinary warranty and quitclaim deeds are among the examples of deeds poll.

§ 556. **Indentures.**— An indenture is a deed containing the mutual agreements between two or more parties. A lease for a term of years, as made use of at the present day, is an indenture. The distinction above outlined arises from the manner of the *preparation* of the instruments, rather than from a difference in the *form* thereof, and with this exception the requisites of a good and valid deed, whether poll or indenture, are identical and may be treated of as one.

§ 557. **The requisites of a deed.**— As to the nature of these requisites it may be said that the essentials of a deed are: (1) The writing; (2) competent parties; (3) a thing to be conveyed; (4) a consideration; (5) the execution; (6) the delivery; (7) registration. Some further investigation of these matters may not be unprofitable.

§ 558. **The writing.**— So far as the writing is concerned, it probably makes no difference in our law upon what material the wording of the instrument is transcribed. Nor need it be precise in language, correctly spelled or en-

<sup>1</sup> Greenl. Cruise, Dig., title 32, that the grantee is to assume and discharge an existing incumbrance  
sec. 16.

<sup>2</sup> As, for instance, a stipulation upon the property conveyed.

tirely grammatical,<sup>1</sup> so long as the meaning and intentions of the parties can be gleaned from the instrument itself. Parol evidence, however, cannot be resorted to for the purpose of supplying deficiencies which render the deed uncertain.<sup>2</sup>

§ 559. **Alterations, etc.**—The deed should be complete in all its essential parts before its delivery; for, as a general rule, any alteration, as adding or crossing out words, filling in blanks, and the like, after delivery, will impair, or perhaps destroy, the validity of the instrument. Where a deed is to take effect in its modified form, exhibiting upon its face alterations or interlineations, such changes must be made prior to its delivery; and where the same are of such import as to affect the scope of the conveyance, before its execution.

§ 560. **Burden of proof.**—There is some controversy on the question upon whom the burden of proof rests to show whether such alterations were made prior or subsequent to delivery. In some jurisdictions it is held that a presumption exists that the changes were made after delivery, and thus the burden of proof is put upon the grantee.<sup>3</sup> In other states it is denied that any presumption exists, and so held that the burden of establishing the validity of the deed is upon him who relies upon it for his title.<sup>4</sup> The effect of the delivery of a deed being as it is to pass the title to the grantee, no alteration or destruction of the deed thereafter can affect the title so vested; and should the grantee lose his deed before he has filed the same for registration, he may apply to a court of equity, and prove the contents thereof by parol testimony.<sup>5</sup>

§ 561. **Of the parties to a deed.**—In common with all instruments having anything of the nature of contracts, a deed can be made and be of force and effect only between those persons who are recognized by the law as competent

<sup>1</sup> 3 Washb. Real Prop. 240.

<sup>2</sup> Deery v. Cray, 10 Wall. 270.

<sup>3</sup> 1 Greenl. Ev., sec. 564.

<sup>4</sup> Comstock v. Smith, 26 Mich. 306.

<sup>5</sup> King v. Gilson, 32 Ill. 354.

parties. In the first place there must be a competent grantor, that is to say, one who possesses the legal capacity to convey the property. The class of persons who are not regarded as competent grantors consists of infants, persons of unsound mind, and, in some jurisdictions, married women. The deeds of infants and persons *non compos mentis* are generally held to be voidable rather than void.<sup>1</sup> These deeds being voidable may be ratified by the proper party thereto after his disability has been removed.<sup>2</sup>

§ 562. **Of ratification and disaffirmance.**—It is of course a question of much difficulty to determine when the degree of mental disturbance is sufficient to avoid the deed. If the grantor prior to the making thereof had regularly been adjudged insane or imbecile, the deed may be avoided without further proof of his condition. In other cases a question may arise as to what, if anything, there was to put the grantee upon inquiry as to the mental condition of the grantor.<sup>3</sup> In some instances on disaffirmance the infant or insane person need not restore the consideration.<sup>4</sup> But under other circumstances he may be required to do so.<sup>5</sup>

§ 563. **Continued.**—What will be a sufficient ratification or a valid disaffirmance will depend largely upon the circumstances of each particular case. It is not necessary that there should be any formal instrument of writing to constitute either the one or the other. It may be accomplished orally or by acts which clearly evidence the intention in question.<sup>6</sup> Mere silence, with full knowledge of the facts, may be sufficient to render the deed unassailable, in those cases where the grantee has been in possession and improv-

<sup>1</sup> *Bensell v. Chancellor*, 5 Whart. 376, 34 Am. Dec. 561; *Crouse v. Holman*, 19 Ind. 30.

<sup>2</sup> *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134.

<sup>3</sup> *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431.

<sup>4</sup> *Scanlan v. Cobb*, 85 Ill. 296; *Kerr v. Bell*, 44 Mo. 120.

<sup>5</sup> *Kitchen v. Lee*, 11 Paige, 107, 42 Am. Dec. 101; *Farr v. Sumner* (Vt.), 36 Am. Dec. 327.

<sup>6</sup> *Hubbard v. Cummings*, 1 Met. 11; *Howe v. Howe*, 99 Mass. 98; *Blankenship v. Stout*, 25 Ill. 132.

ing the property for a reasonable length of time after the disability of the grantee ceased to exist.<sup>1</sup>

**§ 564. Married women as parties to deeds.**—At the common law the deed of a married woman is void; in many of the states, however, statutes are in force whereby a married woman has the same rights with reference to her separate property as those enjoyed by her husband, and this is the tendency of the modern law. Owing to the existence of the estates of dower and curtesy the execution of a deed by a married women is generally done in conjunction with that of her husband, though a deed executed by her alone will convey title to her property subject to the marital estate vested by law in her husband.<sup>2</sup> As statutory provisions exist in the various states regulating the methods of property holding and of alienation by married women, such statutes should be consulted by the student as occasion requires.

**§ 565. Grantees.**—With regard to competency to take property as a grantee there is less restriction than in the case of grantors; for, as a general rule, all persons may so take.<sup>3</sup> There are exceptions to this rule when the disability of the person is of such a nature as to preclude him from performing certain conditions essential to the validity of the grant, and hence in some instances the persons heretofore mentioned are incompetent as grantees.

**§ 566. Naming parties in the deed.**—Finally, with regard to parties, the rule is that they should be properly and correctly named in the deed. The object of this is to assist in the matter of identification. But when the names as inserted are incomplete or even erroneous, the real person to receive the property may establish his identity by extrinsic proof.<sup>4</sup> Permission to do this is in part rendered necessary by the confusion arising from the similarity of names, but there

<sup>1</sup> Hoit v. Underhill, 9 N. H. 439;  
Hartman v. Kendall, 4 Ind. 403.

<sup>3</sup> 3 Washb. Real Prop. 267.

<sup>4</sup> Grand Tower Co. v. Gill, 111 Ill.

<sup>2</sup> 3 Washb. Real Prop. 252; Campbell v. Bemis, 16 Gray, 487. 541; Tostin v. Faught, 23 Cal. 237.



must be a *real* person capable of being definitely ascertained or the deed is void for uncertainty.

§ 567. **Something to be granted.**—As a matter of course no deed could be operative as a conveyance unless there were something the title to which is to be transferred thereby. It will be readily perceived that the greatest necessity exists for clearly expressing in the deed exactly what is to be thus conveyed, both as to its nature and extent, as well as to its location. Otherwise an uncertainty would arise as to the identification of the property. We have already discussed what may be the subject of transfer by deed, and it is only necessary here to urge upon the student the desirability of exercising a high degree of care in this particular in the preparation or examination of instruments of this nature.

§ 568. **The consideration.**—The necessity or not of a consideration, either good or valuable, depends upon the nature of the conveyance. A common-law deed, as hereinbefore explained, operating by transmutation of possession, will be effectual to pass a *legal* title without the necessity of showing any consideration whatever. But it is proper to add the words “to his and their use” to the name of the grantee and his heirs, for if the estate be of fee, there will without such words be raised a resulting use in favor of the grantor, upon which the Statute of Uses will operate to restore the seisin to the grantor.<sup>1</sup> A use, however, will not be so raised where it can be shown that the grantor had the intention to fully part with his lands. Modern statutory conveyances in most instances, and conveyances operating under the statute of uses in every case, must have and express a consideration.<sup>2</sup>

§ 569. **Third parties.**—The question of consideration cannot be discussed without reference to the rights of *third parties*, who, though strangers to the deed, have, as a matter of law, some rights in or concerning the premises conveyed.

<sup>1</sup> 2 Saunders on Uses, p. 65. Obvi-  
ated by statute in some states.

<sup>2</sup> See preceding chapter.

Whether there be a consideration, and whether that consideration be a valuable one and adequate, are questions which largely affect the rights of such third parties. Mere voluntary conveyances, the effect of which is to render the grantor unable to perform his legal obligations to his creditors, are void as against them, and they may invoke the assistance of equity to set aside such conveyances and subject the rights of the grantees therein to their own.<sup>1</sup>

§ 570. **Execution—Signing.**—The due execution of a deed embraces the four essentials of signing, sealing, attestation, and acknowledgment. By the universal rule in this country a deed is required to be signed by the grantor.<sup>2</sup> But such signing may be done by the grantor in person or by some one lawfully authorized by him to do so. Thus a deed may be signed by one holding a power of attorney from the grantor,<sup>3</sup> or, in the case of a person unable to write his name, by any one whom he may request so to do, in his presence, and to which signature the grantor affixes his mark. Powers of attorney to be effectual for this purpose must themselves be under seal, but a deed signed by a person in the presence and at the direction of the grantor will be valid.<sup>4</sup>

§ 571. **Sealing.**—The ancient formalities and legal sanctity that formerly surrounded the sealing of an instrument have largely ceased to exist, but it is still the law in the majority of our states that a seal is necessary to pass the legal title.<sup>5</sup> The seal, generally speaking, need be of no particular form or material,<sup>6</sup> and may even be affixed by some person other than the grantor if so done at his request. It is valid if adopted by the grantor.<sup>7</sup> The deed should recite that the grantor has affixed his seal to further evidence the intention of executing a sealed instrument.

<sup>1</sup> Gridley v. Watson, 53 Ill. 193;  
Baker v. Bliss, 39 N. Y. 70.

<sup>2</sup> Hutchins v. Byrnes, 9 Gray, 367.

<sup>3</sup> Cady v. Shepherd, 11 Pick. 400,  
22 Am. Dec. 379.

<sup>4</sup> Frost v. Deering, 21 Me. 156.

<sup>5</sup> 3 Washb. Real Prop. 271.

<sup>6</sup> Some states require wafers or  
wax.

<sup>7</sup> 3 Washb. Real Prop. 272.

§ 572. **Attestation.**—At common law witnesses to the execution of a deed were not required, and such is now the law in some of our states. It would appear that where witnesses are required, the lack thereof renders the deed inoperative as a legal conveyance in the full sense of the word, and hence is of prime importance. The function of witnesses to a deed is merely to prove the signatures thereto, and the deed need not be signed by them in the presence of the grantor, it being sufficient if he acknowledges the signature as his own.<sup>1</sup>

§ 573. **Acknowledgment.**—Every deed, as a part of its due execution, should be acknowledged; that is, the grantor or grantors should appear before some officer authorized by law to take acknowledgments, and state to such officer that they have signed and sealed the said instrument with full and complete knowledge and understanding of the contents thereof. The officer should thereupon attach his certificate to that effect to the deed.<sup>2</sup>

§ 574. **Object and purpose.**—The object of the acknowledgment, in the broadest sense, is threefold: (1) To admit the deed to record; (2) to provide an additional safeguard against fraudulent conveyances; and (3) to furnish a further means of identification of the grantor and additional proof of due execution by him.

§ 575. **Form of certificate — Effect, etc.**—The formality of acknowledgment very generally must be observed in cases where married women join with their husbands in deeds for the purpose of releasing dower.<sup>3</sup> Whether such acknowledgment be necessary to pass the legal title is a mooted question;<sup>4</sup> but be that as it may, there can be no doubt of its value and propriety as a precautionary measure.

§ 576. **Delivery.**—The next requisite to the validity of a deed as an instrument of conveyance between the parties

<sup>1</sup> Jackson v. Phillips, 9 Cow. 113. 662; Perdue v. Aldridge, 19 Ind.

<sup>2</sup> Washb. Real Prop. 314. See 290.

also statutes in the various states. <sup>4</sup> See various statutory provis-

<sup>3</sup> McBride v. Wilkinson, 29 Ala. ions.

thereto is the *delivery*, and this of necessity implies an acceptance on the part of the grantee. The matters of delivery and acceptance are quite as essential as any of the acts which we have considered with reference to this subject.<sup>1</sup> For, so long as the deed remains with the grantor, it passes no title. Again, the delivery must be made with the intention to pass the title to the grantee; otherwise he gains nothing thereby.<sup>2</sup> To constitute a complete and perfect delivery the deed must be completely executed, and the presumption is that the deed was delivered on the date of its execution.<sup>3</sup> But this presumption is not a conclusive one, and the true date of delivery may be shown for the purpose of establishing the time at which the deed became effective.<sup>4</sup>

§ 577. **Effect of delivery.**— But when a deed is once delivered the title passes to the grantee, and he can be divested thereof only in some manner recognized by law for the alienation of lands. The mere destruction of the deed by him or his handing it back to the grantor will not reinvest the grantor with the title conveyed by the deed. Where a deed appears in the possession of the grantee, the presumption arises that there has been a delivery and acceptance thereof.<sup>5</sup> But this presumption may be overthrown in those cases where the question arises between the parties to the deed or those in privity with them. But in a case where the rights of an innocent purchaser for value would be prejudiced, this presumption will not prevail. No particular form of words, or no certain acts, can be said to constitute a delivery. In determining this question the matter of intention largely governs.<sup>6</sup> And so long as the acts or words, or both, of the grantor evidence a clear intention on his part to make delivery, it will be quite sufficient.

<sup>1</sup> Fisher v. Beckwith, 30 Wis. 55,  
11 Am. R. 546.

<sup>2</sup> Cline v. Jones, 111 Ill. 563.

<sup>3</sup> Lyerly v. Wheeler, 12 Ired. 290,  
53 Am. Dec. 415.

<sup>4</sup> Blake v. Fash, 44 Ill. 302.

<sup>5</sup> Chandler v. Temple, 4 Cush. 285.

<sup>6</sup> Stewart v. Reddett, 3 Md. 67;

Crawford v. Bertholf, 1 N. J. Eq.  
453.

§ 578. **Delivery in escrow.**—It sometimes happens that the grantor is desirous of making a conditional delivery, that is, one which will be effective to pass title provided certain conditions are performed. The method then to be pursued is that of depositing the deed by the grantor with a stranger, to be by him delivered to the grantee when the stipulated conditions are performed. This is called a delivery in escrow,<sup>1</sup> and when completed is effectual to pass title to the grantee.

§ 579. **Registration, recording, etc.**—In conformity with that policy of the law which has ever favored publicity in the holding and transfer of lands, and to the end that all persons having occasion to deal with landed property may be furnished with reliable means for ascertaining the facts with reference to the title thereof, every state of our Union has enacted laws requiring that deeds, among other instruments, shall be filed for record in the county wherein the lands are situated, in order that persons not parties or privies thereto may be bound thereby.

§ 580. **Effect of registration.**—The record of the deed thus made affords constructive notice of the conveyance, and hence when neither of two grantees is in actual possession, the one named in the recorded deed will have preference over the other holding a deed which has never been placed on record.<sup>2</sup>

§ 581. **Requisites of deed for notice, etc.**—Of course, in order to be effective, the deed so recorded must be good and valid, such an instrument as the law permits to be recorded, and the record of the same must be in the usual form and manner.<sup>3</sup> As a general rule, when a deed has been recorded a certified copy thereof is available in evidence in case of the loss of the original.<sup>4</sup>

<sup>1</sup> Plank Road Co. v. Stevens, 10 Ind. 1; Stevenson v. Crapnell, 114 Ill. 19.

<sup>2</sup> Irvin v. Smith, 17 Ohio, 226.

<sup>3</sup> Pringle v. Dunn, 37 Wis. 449; Harper v. Tapley, 35 Miss. 510.

<sup>4</sup> Clague v. Washburn, 42 Minn. 371, 44 N. W. R. 130.

§ 582. Notice, how given, etc.—Notice of the rights of persons in or to real property is either *actual* or *constructive*. Actual notice is given by actual possession; constructive, by means of these recording laws which we are now discussing. This constructive notice is available only as against subsequent purchasers claiming under or through the grantor, and not to strangers or the world at large.<sup>1</sup>

<sup>1</sup>Traphagen v. Irwin, 18 Neb. 195; Shaw v. Poor, 6 Pick. 85.

## CHAPTER XXIII.

### COMPONENT PARTS OF DEEDS.

- § 583. Introductory.
- 584. Component parts enumerated.
- 585. What may be omitted.
- 586. The premises.
- 587. Description.
- 588. Reformation in equity.
- 589. Rules of construction.
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- 592. As to the methods of description.
- 593. Monuments.
- 594. Extrinsic evidence of quantity of land granted.
- 595. The *habendum*.
- 596. *Tenendum* — *Redendum* — Conditions.
- 597. Covenants in deeds.
- 598. Of seisin and right to convey.
- 599. The breach.
- 600. Against incumbrances.
- 601. The breach of this covenant.
- 602. The covenant for quiet enjoyment.
- 603. The covenant of warranty.
- 604. Actions, who may maintain — Damages, etc.

§ 583. **Introductory.**—In addition to those formal requisites to the validity of a deed discussed in the preceding chapter, there remains for our consideration the matter of those elements or component parts which make up the several divisions of instruments of that nature. The student will understand that the use of these component parts as a whole is not essential to the validity of a deed, nor that they be placed therein in the order prescribed. It is desirable, however, to follow the course laid down by the precedents, and to this end familiarize ourselves with the objects and purposes of the component parts of a deed as well as

the order in which they should appear in every properly prepared instrument of conveyance. Again, when we undertake to apply the rules of construction to deeds, we find ourselves at much inconvenience, except it be possible for us to refer to these orderly and component parts of deeds by their several names, and to have due understanding of the purpose and proper contents of each.<sup>1</sup>

§ 584. **Component parts enumerated.**—As stated in the preceding chapter, deeds, as to form, are divided into deeds poll and indentures. The peculiarities and distinguishing features of each were then discussed. The early writers upon the subject divided the deeds then in use into seven orderly or constituent parts, viz.: premises, *habendum*, *tenendum*, *redendum*, condition, warranty, and covenants.<sup>2</sup> Though the modern deed does not always follow this order nor contain all of these parts, it is customary to observe a similar division when considering the constituent elements of a good deed and the rules of construction applicable to them.<sup>3</sup>

§ 585. **What may be omitted.**—It is stated by Coke that a deed operating as a feoffment is good though it contain nothing but the gift, provided it be sealed and delivered, with livery where necessary.<sup>4</sup> And with us it cannot be doubted that a deed will be effective to pass title no matter though informal, if only it contain some expression of an intent to convey the land described, and is duly executed and delivered as the deed of the party making it. So far as merely transferring the *legal* title is concerned, the premises is the only part of a deed which cannot be dispensed with.<sup>5</sup>

§ 586. **The premises.**—The names of the parties, the consideration, recitals by way of explanation, identification and like matters, the description of the property granted with the exceptions or reservations if any, the words of grant, and usually the estate or quantity of ownership (the

<sup>1</sup> See Maine, *Ancient Law*, 276.

<sup>4</sup> Co. Lit. 7a.

<sup>2</sup> Shep. Touch. 74; Co. Lit. 6a.

<sup>5</sup> 4 Kent's Com. 461.

<sup>3</sup> 3 Washb. Real Prop. 365.



latter may be supplied by the *habendum*, though if repugnant the *habendum* will yield to the premises where it is definite in limiting the estate),<sup>1</sup> are all embraced in what is termed the *premises* of a deed.<sup>2</sup> These several elements have heretofore received our attention, but something additional ought perhaps to be said with regard to the description.

§ 587. **Description.**—We should understand at the outset that a clearly-worded description can never be contradicted or controlled by parol testimony.<sup>3</sup> And it is this rule of law which compels the conveyancer to employ a high degree of care in the matter of description. But the court will uphold and enforce the grant if, by the application of any reasonable rule of construction, it is possible to gather the intention from the description, no matter how informally it may be worded, nor in what general terms it is expressed.<sup>4</sup> If, however, the subject of the grant cannot be ascertained from the description the deed will be void for uncertainty.<sup>5</sup>

§ 588. **Reformation in equity.**—Courts of equity have power under certain circumstances to reform deeds, to the end that the intentions and desires of the parties thereto may not be defeated.<sup>6</sup> But such reformation will not be decreed where the uncertainty may be removed by the application of any of the established rules of construction,<sup>7</sup> nor in cases where the parties have mistaken the legal operation of the deed.<sup>8</sup> The student is advised to consult a work on equity jurisprudence for further information on the subject of this section.

§ 589. **Rules of construction.**—The law will not permit an estate to depend upon the use or omission of punct-

<sup>1</sup> *Budd v. Brooke*, 3 Gill, 236.

<sup>2</sup> 3 Washb. Real Prop. 366.

<sup>3</sup> *Broom's Leg. Max.* 477.

<sup>4</sup> *Wabash R. Co. v. McDougal*, 113 Ill. 603; *Smith v. Westall*, 76 Tex. 509.

<sup>5</sup> 3 Washb. Real Prop. 381; 1 Wood, Conv. 206.

<sup>6</sup> *Adams v. Stevens*, 49 Me. 362.

<sup>7</sup> *Andrews v. Spurr*, 8 Allen, 416.

<sup>8</sup> *Hutchings v. Higgins*, 59 Ill. 32.

uation, and consequently the marks thereof are not taken into consideration in determining the meaning of the instrument.<sup>1</sup> Another well-recognized rule is that the language of the deed is presumed to be that of the grantor, and hence that if there be a point of doubt it shall be taken most favorably for the grantee. This rule, however, is applied only as a last resort, as its use may frequently lead to conclusions of an inequitable character.<sup>2</sup>

§ 590. **Construction continued.**—It is a further rule that a deed must be so construed, if possible, that no part thereof shall be rejected, so that force and effect may be given to all its provisions.<sup>3</sup> When this cannot be done, effect is sought to be given to the *general* rather than any *particular* intention of the parties. Thus the former of two repugnant clauses is held to prevail over the latter, but the terms of the *granting* cause will determine what is to be taken, as against the conditions of an introductory clause. And where a deed is partly written and partly printed, so long as it is intelligible the written provisions will prevail.<sup>4</sup>

§ 591. **Same subject continued.**—Under the maxim, *Falsa demonstratio non nocet*, if the instrument sets forth with sufficient certainty what is the subject of the grant, a subsequent erroneous addition will not vitiate it.<sup>5</sup> Thus, an officer's deed was of "all the right and title" of A. to certain lands, "being a leasehold unexpired," when in fact he owned a fee. It was held that the fee passed.<sup>6</sup> Parol evidence may be admitted to make plain *latent*, but not *patent*, ambiguities, and so the condition and circumstances of the parties, or other pertinent facts, existing at the time of the conveyance, may be proved by parol testimony, when the terms have not clearly indicated the intention of the parties.<sup>7</sup>

<sup>1</sup> Will. Real Prop. 161.

<sup>6</sup> Dodge v. Walley, 22 Cal. 224.

<sup>2</sup> Marshall v. Niles, 8 Conn. 469.

<sup>7</sup> Abbott v. Abbott, 51 Me. 582;

<sup>3</sup> Waters v. Breden, 70 Pa. St. 238.

Bond v. Fay, 12 Allen, 88. See also the leading case of Worthington

<sup>4</sup> 3 Washb. Real Prop. 398.

<sup>5</sup> Broom's Leg. Max. 490; Morrow

v. Hylyer, 4 Mass. 196.

v. Willard, 30 Vt. 118.

§ 592. As to the methods of description.— Frequently the *quantity* of land to be conveyed is mentioned in the deed, but this is regarded merely as a part of the description, and is governed by the general grant. Hence good conveyancers at the present day are wont to add to the description the words, “containing or embracing therein blank acres more or less,” or some similar phraseology.<sup>1</sup> So also measurements of distances, from the fact of their well known liability to inaccuracy, will give way to established boundaries and monuments that are specified in the deed.<sup>2</sup> For it is a general rule that the nature and quantity of the interest to be operated upon are always to be ascertained from the instrument itself,<sup>3</sup> and that where is a discrepancy between two or more descriptions given in the deed, that one will be adhered to as to which there is the least likelihood that a mistake could be committed.<sup>4</sup> The order of applying boundaries is, first, to natural objects; second, to artificial marks; third, to courses and distances given in the deed.<sup>5</sup>

§ 593. Monuments.— As a rule of law applicable to the matter in hand, monuments must control courses and distances in every case.<sup>6</sup> Monuments may be either natural or artificial. Trees, streams, highways, or indeed any object which may serve to indicate the boundaries of lands, when not placed there for that especial purpose, are natural monuments.<sup>7</sup> But in many localities the lands were by acts of congress surveyed and divided into convenient parcels for the purposes of use and of sale, and artificial monuments were placed to determine the form and extent of these parcels or divisions of lands.<sup>8</sup> Such artificial monuments are indicated

<sup>1</sup> Hall v. Mayhew, 15 Md. 551;  
U. S. Digest, “Boundaries,” sec. 41.

<sup>2</sup> Evansville v. Page, 23 Ind. 527.

<sup>3</sup> Lippett v. Kelly, 46 Vt. 516.

<sup>4</sup> 3 Washb. Real Prop. 405; 3 Jones,  
Eq. 29.

<sup>5</sup> Beahan v. Stapleton, 13 Gray,  
427.

<sup>6</sup> Wells v. Company, 47 N. H. 235.

<sup>7</sup> Bates v. Tymanson, 13 Wend.

300.

<sup>8</sup> The divisions into townships,  
sections, and fractional sections.

as to their locations upon the maps and records of the surveys and measurements under which they are established.<sup>1</sup>

§ 594. **Extrinsic evidence of quantity of land granted.** A description in a deed may be aided by reference to other deeds, maps, etc., and when properly applicable such other documents become to all intents and purposes a part of the deed under consideration.<sup>2</sup> Many things which are *appurtenant* will pass with the general grant of the lands, unless especially reserved.<sup>3</sup> Exceptions and reservations withdraw the object thereof from the operation of the grant. There is some technical distinction between the meaning of these two words, and both are to be distinguished from conditions. But the discussion of these differences must be left to a more comprehensive work on the subject.<sup>4</sup>

§ 595. **The habendum.**—This is the clause which follows the words “to have and to hold” and defines the *quantity of interest* or estate which the grantee is to take in the lands. As we have seen, this clause frequently yields to the general provisions of the grant as expressed in the premises, and is not absolutely essential to the validity of a deed. But where the *habendum* contains provisions not inconsistent with, but rather explanatory of, the general grant, it may be taken in connection therewith and thus aid in giving effect to the intentions of the parties to the deed.<sup>5</sup> So the *habendum* may limit or qualify the operation of the premises, as, for instance, to change the character of joint tenants to tenants in common, etc. It is further the proper place in the deed to insert declarations of uses and trusts, or to name the grantees where their names do not appear in the premises.<sup>6</sup>

<sup>1</sup>Sufficient has already been said in our introductory chapter regarding boundaries by lakes and streams, etc. Hereditaments,” *infra*, for appurtenances.

<sup>4</sup>See Jones on Conveyancing.

<sup>2</sup>Miller v. Topeka Land Co., 24 Pac. R. (Kan.) 420. <sup>5</sup>1 Wood, Conv. 224; Riggin v. Love, 72 Ill. 553; 3 Prest. Abst. Title, 43.

<sup>3</sup>See chapter on “Incorporeal <sup>6</sup>Irwin v. Longworth, 20 Ohio 581.

§ 596. **Tenendum — Redendum — Conditions.**— The *tenendum* clause, having reference to the matter of tenure, according to the feudal system, is of no moment in our law. The *redendum* is the clause which contains the reservations, the consideration of which we have heretofore undertaken. Following the *redendum* are the *conditions*. This matter has already been explained at such length as the scope of this work would seem to indicate as advisable. There remains for our investigation the matter of Covenants in Deeds, to which we shall now proceed.

§ 597. **Covenants in deeds.**— A covenant is an agreement or undertaking embodied in a sealed instrument; thus, those parts of deeds which refer to matters of contract or agreement therein are termed *covenants in deeds*. Such covenants generally have reference to the title and are called covenants of title, though the legal effect of a grant may sometimes be governed by the provisions contained in a covenant.<sup>1</sup> The covenants found in our modern deeds are the following: Of seisin, of the right to convey, against incumbrances, for quiet enjoyment, and of warranty. In many of the states only the covenant of warranty is employed, it being held that it has the legal force and effect of the others. In some jurisdictions, however, the deed should contain all the covenants above enumerated. The primary object of covenants in deeds is to afford a remedy to the grantee in case the title prove defective or the grantor fail in some other of his undertakings.<sup>2</sup>

§ 598. **Of seisin and right to convey.**— These two covenants resemble one another so closely that we may treat of them as identical. Their purport is that the grantor represents himself as lawfully seised of the premises, and that he has full right to convey the same. It would appear from the weight of authority that the covenant of lawful seisin is satisfied by the possession of actual seisin, though the same

<sup>1</sup> Adams v. Ross, 30 N. J. L. 509;      <sup>2</sup> 3 Washb. Real Prop. 447.  
Blanchard v. Brooks, 12 Pick. 67.

be tortious, and that if under such circumstances the true owner evicts the grantee, there will be no breach of the covenant of seisin.<sup>1</sup> But if the grantor be neither seised nor in possession when he conveys, this covenant is broken as soon as made, and action accrues thereon to the grantee,<sup>2</sup> who alone can maintain it under such circumstances. But if the grantor covenants that he is seised of an *indefeasible* estate, it is a future covenant and passes with the land by conveyance thereof; that is, it is "a covenant running with the land," and upon breach thereof any one who holds under the covenantee may sue thereon.<sup>3</sup>

§ 599. **The breach.**—To keep his covenant inviolate the grantor must have the very estate, both as to quality and quantity, which he purports to convey, so if the estate be less in either particular it will amount to a breach of the covenant; or if there be an outstanding right or title which diminishes the estate conveyed in the matter of its nature or extent. But the existence of an easement consistent with the seisin of the grantor, a mortgage, a right of dower, or a judgment lien, will not constitute a breach.<sup>4</sup>

§ 600. **Against incumbrances.**—The covenants of seisin and right to convey afford no protection against incumbrances, and hence the covenant against incumbrances is inserted in the deed. Mr. Greenleaf defines this to be a covenant intended to provide security against the assertion of every right to or interest in the land which may subsist in third persons, but consistent with the passing of the fee by the conveyance.<sup>5</sup> Such a covenant may be *in præsentia*, as where it is to the effect that the estate *is free* from incumbrances, in which case the breach occurs at once if at all, and the right of action does not pass to the assignees of the

<sup>1</sup> Richards v. Brent, 59 Ill. 45; 134; Lockwood v. Sturdevant, 6 Dale v. Shively, 8 Kan. 276; Mars- Conn. 373.

ton v. Hobbs, 2 Mass. 433; Kirken-  
dall v. Mitchel, 3 McLean, 145.

<sup>2</sup> Baokus v. McCoy, 3 Ohio. 218.

<sup>3</sup> Raymond v. Raymond, 10 Cush.

<sup>4</sup> Wheeler v. Hatch, 12 Me. 389;  
Phipps v. Tarpley, 24 Miss. 597. See  
also Walker v. Wilson, 13 Wis. 522.

<sup>5</sup> 2 Greenl. Ev., sec. 242.

grantee.<sup>1</sup> Or the covenant may be so construed as to amount practically to one for quiet enjoyment, that is, that the grantee shall *enjoy* the lands free from incumbrances, and in such case it will be *in futuro*, and hence run with the land.<sup>2</sup>

§ 601. **The breach of this covenant.**—The general rule is that the grantee or his assigns, as the case may be, can recover whatever loss they may have sustained by the enforcement of the incumbrance. *When* the action accrues will depend upon the circumstances of each case, as will also the measure of damages to be applied. As to what is an incumbrance such as will constitute a breach of this covenant, the general rule is that every outstanding right which comes under the general definition of incumbrances will have that effect. Among these may be mentioned mortgages, judgment liens, that of taxes and assessments, leasehold interests where the lessees are in possession, easements, marital estates, and any conditions or limitations restricting the beneficial use of the property conveyed. The fact that the grantee knew of the existence of the incumbrance when he accepted the deed is no defense to an action for the breach of this covenant.<sup>3</sup>

§ 602. **The covenant for quiet enjoyment.**—This covenant imports “an assurance against the consequences of a defective title and of any disturbances thereon.”<sup>4</sup> It is used throughout the United States, chiefly in the creation of estates for years, being generally superseded in the conveyance of freeholds by the covenant of warranty, which it so much resembles.<sup>5</sup> As to what will constitute a breach of this covenant, the general rule is that nothing but actual or constructive eviction, by the assertion of the paramount title, will constitute a breach of this covenant.<sup>6</sup> So long as

<sup>1</sup> *Guerin v. Smith*, 62 Mich. 369.  
<sup>2</sup> *Rawle, Cov.* 92.

<sup>3</sup> *Beach v. Miller*, 51 Ill. 206; *Hubbard v. Norton*, 10 Conn. 431.

<sup>4</sup> *Tied. Real Prop.*, sec. 855, citing *Howells v. Richards*, 11 East, 633.

<sup>5</sup> *Rawle, Cov.* 126.

<sup>6</sup> *Scrivner v. Smith*, 100 N. Y. 471; *Drew v. Towle*, 30 N. H. 537.

the attempt to evict the grantee or his assigns proves ineffectual they have no action for a breach of this covenant.<sup>1</sup>

§ 603. **The covenant of warranty.**— This covenant is the broadest in its scope, and the one of which the most frequent use is made. In the first place it is of two sorts: *general* and *special*. It should also be noted that this covenant may be made either *expressly*, or it may arise by *implication*. The division into general and special has reference to the persons or class of persons against whom the covenant may run. Where the grantor covenants to warrant and defend the title against the lawful claims of *all persons whomsoever*, the covenant is one of general warranty. When he covenants only against the acts of all persons claiming by, through or under him, and as against the acts and doings of no others, the covenant of warranty is a special one. Implied covenants cannot arise under that class of conveyances which operate through the statute of uses, for such conveyances do not raise covenants by implication.<sup>2</sup> But by statute in many of the states the words “grant, bargain and sell” are made to imply general covenants of seisin and warranty.<sup>3</sup> Where the effect of an implied covenant in this regard is desired to be avoided in such jurisdictions, words different from those mentioned in the statute should be employed.

§ 604. **Actions, who may maintain— Damages, etc.**— A covenant of warranty runs with the land until there has been a breach. There can be no assignment of this breach, and upon its happening the covenant ceases to run with the land.<sup>4</sup> The grantee, or his assignee in possession at the time of the breach, is, as a general rule, the only person who can maintain action for the breach of this covenant.<sup>5</sup> If evic-

<sup>1</sup> Thomas v. Stickle, 32 Iowa, 76; Russ v. Steele, 40 Vt. 315.

<sup>2</sup> De Wolf v. Hayden, 24 Ill. 529; Sanford v. Travers, 40 N. Y. 140; 3 Washb. Real Prop. 489.

<sup>3</sup> 4 Kent's Com. 473; Walker, Am. Law, 381.

<sup>4</sup> Forder v. Walsworth, 19 Wend. 334; Brown v. Metz, 33 Ill. 339.

<sup>5</sup> Chase v. Weston, 12 N. H. 413; Kane v. Sanger, 4 Johns. 89.



tion has taken place, full damages may be recovered; but if the grantor secures the paramount title before the eviction takes place, the plaintiff can recover nominal damages only.<sup>1</sup> What is the proper measure of damages in the various cases should be investigated in some special work on that subject.<sup>2</sup> The breach of a covenant, such as of warranty, or of restriction upon the use of the land, etc., will not of itself work a forfeiture of the estate, giving rise only to personal actions for damages. A covenant may, however, be so worded as to amount to a *condition*, and in such event the grantor might re-enter as for a breach of condition. The courts are prone to construe such provisions to be covenants rather than conditions, thus avoiding a forfeiture of the estate.<sup>3</sup>

<sup>1</sup> *King v. Gilson*, 32 Ill. 356.

<sup>3</sup> *Ayer v. Emery*, 14 Allen, 69;

<sup>2</sup> See Sedgwick on Damages.

*Parsons v. Miller*, 18 Wend. 564.



# LEADING AND ILLUSTRATIVE CASES.

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## CHAPTER I.

### THE NATURE AND DISTINGUISHING FEATURES OF REAL PROPERTY.

#### **Strong v. White et al.**

Decision by Supreme Court of Errors of Connecticut, July, 1848. Opinion by Storrs, J.

*(Reported in 19 Conn. 238.)*

The principal question in this case is whether the bequest to the defendant, James W. White, of the testator's "movable property," embraced the judgment against Stewart.

The law attaches no technical or artificial meaning to that phrase; and we must therefore construe it according to its ordinary signification, unless there is something in the other parts of the will which shows that the testator intended to use it in a different sense. But we find nothing elsewhere in that instrument which sheds any light on the subject in this respect. The popular meaning must therefore prevail. The adjective "movable," applied to property, signifies, in its ordinary and proper sense, that which is capable of being moved, or put out of one place into another. It therefore necessarily implies that such property has an actual locality, and is susceptible of locomotion, or a change of place. But this is predicable of that only which is corporeal and tangible. A judgment is obviously not of this character; since, like other choses in action, it is in its nature incorporeal, and therefore has no real locality; although, as we shall hereafter have occasion to perceive, judgments sometimes have in contemplation of law for certain purposes (not applicable to the point now before us), a fictitious or imaginary locality assigned to them, and are deemed to exist in a particular place.

It is, however, insisted that the word "movable," applied as an epithet to property, is equivalent to the word "personal;" and in support of this claim we are referred to Blackstone. This position, however, so far from being supported, is discountenanced by that writer. In his chapter describing the nature and kinds of personal property (2

Comm. 383), he commences by stating that "under the name of things personal are included all sorts of things movable which may attend a man's person wherever he goes;" and he subsequently adds: "But things personal, by our law, do not only include things movable, but also something more; the whole of which is comprehended under the name of 'chattels.'" He then proceeds to show that this last term signifies not only goods or movables, but whatever was not a feud, and adds: "It is in this latter, more extended, negative sense, that our law adopts it; the idea of goods or movables only, being not sufficiently comprehensive to take in everything that the law considers as a chattel interest." From this passage it is quite plain that he did not deem the phrases "movable property" and "personal property" to be equivalent; but, on the contrary, that he considered movable property to be only one of the several species of personal property.

Judge Blackstone, speaking of what is included in personal property, mentions "movables which may attend a man's person," etc. It is, we think, moreover, plain from the context and his subsequent enumeration (on page 387) of what he intended to embrace by that expression, that he used it in its literal, primitive sense, as indicating that particular species of personal property which consists of tangible, corporeal, locomotive chattels, and not choses in action, to which it would apply only in an imaginary, artificial, legal sense: a chose in action having, as it is sometimes expressed, no corpus, but being a mere right, not in a thing (*in re*), but to a thing (*ad rem*), and having, therefore, no actual locality; which right is indeed often evidenced by a written instrument, although such instrument does not constitute right itself, nor in any sense the property therein. Indeed, those instruments, such as bonds, bills and notes, were not, at common law, the subjects of larceny, because they were not deemed to be of any intrinsic value. *Calye's Case*, 8 Coke, 33; 1 Hawk. P. C., c. 33, § 55; 4 Bl. Comm. 234. Nor do we find any case in which they give a locality to debts evidenced by them, so that those debts pass by a general bequest of property described as being situated in the place where those instruments happen to be. On the contrary, it is held that a bill of exchange, mortgage, bond, or banker's receipt, do not pass by a bequest of all the testator's property in a particular house, where those instruments are; and the reason given is, that bills, bonds, etc., are mere evidence of title to things out of the house, and not to things in it. *Fleming v. Brooke*, 1 Schoales & L. 318; *Lambert v. Lambert*, 11 Ves. 607. So a bequest of indoor movables has been held not to include notes and other choses in action. *Penniman v. French*, 17 Pick. 404. We cannot suppose that Judge Blackstone intended to convey a different idea from that which we have imputed to him, by those general and casual expressions to which we have been referred, in other portions of his Commentaries, which, although not perhaps critically exact, were sufficiently so, for the purpose for which

he introduced them in that elementary work, but were not designed to have any reference or application to such a point as the one now before us. See 1 Steph. Comm. 156; 2 Steph. Comm. 65, pt. 2, c. 1; Co. Litt. 118b; 1 Atk. 183; Com. Dig., tit. "Biens," D. 2.

The same remark also applies to the quotations which have been made by the defendants from other elementary writers.

We have looked in vain at the cases on the subject of devises to find any judicial construction of the particular phrase "movable property," used in the bequest here in question, either as connected or not with the other language of the will, in reference to the question whether choses in action are thereby embraced. In *Sparke v. Denne*, W. Jones, 225, however, is a determination upon the meaning of a bequest, the language of which is exactly synonymous with that phrase, and where, as in the present case, the construction of it was not aided by any other part of the will. The testator in that case, after devising several pecuniary legacies to several persons, devised the residue "of all my movable goods and chattels" to his wife. The question was whether debts due on bond to the testator at the time of his decease passed by that bequest; and it was held, after much argument and consideration, that they did not. The court say, that "by the devise of 'all my movable goods and chattels,' debts which are *jura* [rights or choses in action] are not devised." The words "movable property," used in the devise before us, and the words "movable goods and chattels," used in the devise in that case, are precisely equivalent, both phrases having relation to personal property. If, therefore, the bequest is restricted by the word "movable" in one case, it must be in the other. It is well settled that a bequest of "all my goods and chattels" is sufficiently comprehensive to embrace every species of personal property, and consequently choses in action; but it was there held to be restricted by the term "movable," so as to exclude debts; that word having been construed according to its ordinary and proper meaning, as applying only to tangible personal property. This case, therefore, is in point; and we find no other that is inconsistent with it. If the bequest in the present case had been of all the testator's movables, his intention to exclude debts due to him would have been more palpable; but it is difficult to distinguish that term in meaning from the phrase "movable property." There are other cases, besides the one cited, which have some, although not such a particular, bearing on the question before us, as renders it important for us to notice them.

We think, therefore, that the judgment against Stewart did not pass by the devise in question.

Judgment debts are *bona notabilia* in the state only where the judgments are rendered. It therefore appertained solely to the proper tribunal of the state of Ohio to cause the judgment against Stewart to be administered upon there as a part of the estate of David White, Sr.

For that purpose the law imputes to it a locality within that jurisdiction, and not elsewhere. The authorities are decisive on this point. Cro. Eliz. 472; 3 Dyer, 305a, *in notis*; 3 Bac. Abr. 37. 38; Toller, 55; 1 Wms. Saund. 274, note 3; *Slocum v. Sanford*, 2 Conn. 533.

In the case last cited the law is thus stated by Gould, J.: "As to the transmission of personal chattels, by succession, distribution or bequest, the rule is that they have no locality, but follow the law of the last domicile of the deceased owner. But with respect to the question of probate jurisdiction, the cases establish this distinction: that debts by specialty or judgment have a temporary locality, but that those due by simple contract have not. The former are regarded as effects only at the place where the securities are found at the death of the creditor; the latter follow the person of the debtor, and are considered as effects in the jurisdiction in which the debtor is, at the time, domiciled."

The executors of David White, Sr., therefore, were not guilty of any breach of duty in not causing the judgment against Stewart, recovered in Ohio, to be inventoried here. But when the defendant, Joseph W. White, one of those executors, after the death of his co-executor, by means of a suit brought here upon that judgment, collected a part of the amount due thereon, it became his duty to account therefor to the court of probate; and for neglecting to do so, he became liable on his official bond, which requires him to account to that court for all the property of the testator which should at any time come into his hands or possession.

[Here the judge stated the breaches assigned in the plaintiff's replication.]

The first breach assigned, regarding the neglect of the executors to inventory the judgment rendered in the state of Ohio against Stewart, constitutes, as we have seen, no violation of their duty, and, indeed, is not relied upon by the plaintiff. Whatever we might think as to the validity of the second breach, which we do not deem it necessary to consider, we are of opinion that it sufficiently appears from the allegations in the third that the said James has never rendered to the court of probate any account for what he received on the judgment recovered by him; and that he is, therefore, liable on his bond. This breach is obviously framed somewhat inartificially. It seems to have been drawn up under a mistaken impression that it was the duty of the surviving executor to exhibit to that court a technical inventory of the judgment recovered by him, or of its proceeds. But he alleges that the executor had converted and applied to his own use the money received for the land set off to him under that judgment; and we think that, connecting that averment with the subsequent allegation of his neglect to exhibit an inventory, and construing the whole together, with reference to the subject-matter, it may fairly be considered as amounting to a statement that he had unlawfully disposed of that money, and neglected

to account for it to the court of probate. No special demurrer being interposed for want of form in the replication, we are not disposed to be very nice in regard to the construction of this part of the pleadings. We do not intend, however, to decide whether the allegations in this breach would be held sufficient to subject the defendant for not rendering an account, in a case where a technical inventory is required. A different question might be there presented.

The damages should be the sum received for said land by said executor, with interest.

The superior court is advised to render judgment for the plaintiff accordingly.

In this opinion the other judges concurred.

Judgment for plaintiff.

### Canfield v. Ford.

Decision by Supreme Court of New York, September, 1858. Opinion by Potter, J.

*(Reported in 28 Barb. 336.)*

The only real question to be decided in this case is whether the parties to this action have such an estate or interest in the lands in question as is susceptible of partition by action.

It is conceded that Jonathan Fuller was the original source of title, and that he owned the entire estate in fee simple, in quantity and quality, and that the conveyance from him to the defendant, and from the defendant Ford to Canfield, and from Canfield to Chapman, in form and covenants, are alike. It is therefore sufficient to set forth one of these conveyances. On the 6th of November, 1847, Fuller and his wife conveyed by deed to Chillion Ford, the defendant, "and to his heirs and assigns forever, all the mines, ores, minerals and metals lying or being in or upon the lands of the parties of the first part, situate, lying and being in the town of Depeyster, in the county of St. Lawrence [describing three parcels of land], together with the right to raise, work, and carry away said mines, ores, minerals and metals. And the right to put up all buildings, and to use all lands that may be necessary for the purposes aforesaid. And the right of ingress and egress thereto and therefrom for the purpose of raising, digging and working and carrying away said mines, ores, minerals and metals as aforesaid. And all the estate, right, title, interest, claim and demand whatsoever of the parties of the first part of, in and to the above-granted mines, ores, minerals and metals. To have and to hold the above mentioned and described mines, ores, minerals and metals, to the said party of the second part, his heirs and assigns forever;" with a covenant to warrant and defend the same, in the usual form of a deed of warranty.

The Revised Statutes provide that when several persons shall hold and be in possession of any lands, tenements or hereditaments as joint tenants, or as tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years, any one or more of such persons, being of full age, may apply to the court for a division or partition of such premises, according to the rights of the respective parties interested therein, and for sale of such premises, if it shall appear that a partition cannot be made without great prejudice to the owner. Is the interest in question such an interest as comes within the meaning and intent of this statute? Either of the terms employed in this statute would seem to include the estate of the parties in this action. "Land," in its most general sense, comprehends any ground, soil or earth, whatsoever, as meadow, pastures, woods, moors, waters, marshes, furzes and heaths. Co. Litt. 4a. It includes all things of a permanent and substantial nature; not only the face of the earth, but everything under it or over it. 2 Bl. Comm. 18. "*Cujus est solum ejus est usque ad cœlum, et ad inferos.*" "Tenements" is a word of greater meaning and extent, sometimes, than land, and includes not only land, but rents, commons, and several other rights and interests issuing out of or concerning land. 1 Steph. Comm. 158, 159. "Hereditaments" is a still more comprehensive term in law, and includes whatever may be inherited, corporeal or incorporeal. 2 Bl. Comm. 17. These terms, therefore, seem to be comprehensive enough to include the estate in question. I think there can be no doubt that the estate in question is an estate of inheritance. It is so by the very terms and forms of the grant. The difficulty suggested upon the argument was, how to describe this estate so carved out of the whole fee. If it is an estate that can be partitioned, the precise description is not very material; nor is the question as to what would be the rights of the parties after partition at all necessary to be discussed here. The latter question does not arise in this review. The counsel for the defendant has argued, with great force, that the right or interest which was conveyed as above stated is not a fee simple. In this I think he is mistaken upon authority. 2 Rev. St. 722, § 2. It is not, however, necessary that it should be a fee simple, to entitle to partition. Whatever estate it may be, the owner has such an interest in it that he can maintain trespass *quare clausum fregit* for any wrong done to it. Worcester v. Green, 2 Pick. 429. True, Lord Coke says: "An inheritance in fee simple expresses the largest estate that a man can have in land." But Littleton says: "This doth extend as well to all fee simples conditional and qualified, as to fee simples pure and absolute, for our author speaketh here of the ampleness and greatness of the estate, and not of the perdurableness of the same, and he that hath a fee simple qualified hath as ample and great an estate as he that hath a fee simple absolute. So as the diversity appeareth between the quantity and



the quality of the estate." Litt. 18a. And so also Plowden says: "That two fees simple absolute cannot be at the same time of one and the selfsame land." Plowd. 249. That is, the mines, ores and minerals being land, a man may have a fee simple in them as well as he who holds the soil that remains unconveyed may have a fee simple, for they are not the selfsame land. A man may have a fee simple not only in lands, but also in advowsons, commons, estovers, and other incorporeal hereditaments. So if a man grants to another all woods, underwoods, timber trees, or others, saving the soil, the grantee has a fee to take in "*alieno solo*." Crabb, Real Prop., § 964. The estate so partitioned, therefore, is an estate of inheritance, a fee simple. It is limited in quantity, not in quality. It is carved out of a fee simple absolute, and the latter, having lost this quantity of estate, is itself qualified to that extent, without losing its quality of a fee simple. The estate in controversy, I think, may also be classified among estates, as a "corporeal hereditament;" and comes within the definition of that estate, to wit: "Such hereditaments as are of a material and tangible nature, such as may be perceived by the senses, consisting wholly of substantial and permanent objects, and may be comprehended under the general denomination of lands only." Steph. Comm. 159; Bouv. Law Dict. 288.

The class of cases referred to by the learned counsel for the defendant, which may not be partitioned, are cases of mere license, or authority to enter upon another's land, and to do a particular act, or series of acts, without possessing any estate in the land. Such interests, it is true, cannot be partitioned. This class of cases is nearly allied to, and very often confounded with, a still superior interest in real property, called an "easement," which is described as "a liberty, privilege or advantage in land, existing distinct from an ownership in the soil, and is founded on a grant by deed, or writing, or upon prescription which supposes one, being a permanent interest in another's land without profit, with a right at all times to enter and enjoy it." 3 Kent, Comm. 452. Such an interest possible, may not be partitioned. The distinction between the two classes of cases last above mentioned, and that of a permanent grant for a good consideration of an interest in lands to be used for profit, to a man, and to his heirs and assigns forever, is palpable. There is still another distinction found in the old law books, existing in regard to estates of inheritance,—entire estates of inheritance not divisible, and estates that are divisible and yet shall not be parted or divided between coparceners. Among the examples given of them is found the following: "If a man have reasonable estovers, as housebote, haybote, etc., appendant to his freehold, they are so entire as they shall not be divided between coparceners." Co. Litt. 164b. "So, too, of a *pischarie incertaine*, or a *commons sauns nombre*, or of a *corody incertaine*." Id. Another instance cited by Littleton, of estates

that shall not be partitioned, is this: Lord Mountjoy, being seised of the manor of C., did by deed, indented and enrolled, bargain and sell the same to one Browne in fee, in which indenture was contained a clause on the part of Browne, amounting to a grant by him of an interest and inheritance to Lord Mountjoy, his heirs and assigns, to dig for ore in the lands (which were a great waste), parcel of the said manor, and to dig for turf; also for the making of alum. In this case three points were resolved upon by all the judges, viz: First. That this conveyance did amount to a grant of an interest and inheritance to Lord Mountjoy, to dig, etc. Second. That notwithstanding this grant, Browne and his heirs and assigns might dig also, and like to a case of common "*sauns nombre*." Thirdly. That the Lord Mountjoy might assign his whole interest to one, two, or more, but then, if there be two or more, they could make no division of it, but work together with one stock. Co. Litt. 164b.

It will be seen that the reason given by the judges why partition could not be made in the case above cited does not at all apply to the case in question. First. the exclusive right or all the right to mines, ores, etc., was not granted in that case, but a mere right or permission to dig, etc. The grantor and his assigns might also dig. And second, the extent of the grant being uncertain, the grantee might surcharge, to the injury of the tenant of the land. Interests uncertain in their extent could never be partitioned. In the case now in question the tenant would be bound to take the estate subject to the terms of the conveyance, granting the exclusive right to all the mines, etc., and of the right to put up all buildings, and use all lands that may be necessary for the purposes expressed, and the right of ingress and egress thereto and therefrom. The terms of the grant, by construction, being taken most strongly against the grantor, and the whole interest in the mines, etc., being conveyed, it is immaterial to the grantor whether one person with fifty or more laborers, or fifty or more persons singly, should dig thereon, provided they use no more of the land than is necessary for the purpose of digging, etc., all the mines, ores, etc. This is a certain grant, and no difficulty occurs in making equality of division.

But if the provisions of our Revised Statutes are not broad enough to include the power to partition, it has been settled that this court, as now constituted, has common-law jurisdiction to partition real estate (Story, Eq. Jur., §§ 646, 658; *Smith v. Smith*, 10 Paige, 470), limited, however, to the power to divide estates certain. It is only necessary in a court of equity, to entitle to partition, so far as this point is in question, to show that equality can be obtained, in value, of lands, especially in advantages and profits redounding from each share to the several owners. Alln. Part. 10. Whatever is capable of being divided may be the subject of partition in equity. Id. 84. The only remaining question raised in the case is whether the owner in fee qualified in quan-

tity, out of which the estate in question was carved, ought not to be made a party to the action. The statute (2 Rev. St. 318, § 5) requires that the petition (complaint) shall set forth the rights and titles of all persons interested therein, etc. What interest can Fuller, the grantor of this estate, have in the estate, which by deed he has conveyed away? In the estate sought to be partitioned he has no interest whatever. The partition in no respect affects the title of Fuller. He is not a tenant in common with the parties to the suit. They own separate portions of the estate, in severalty.

I think the judgment must be affirmed.

Judgment affirmed.

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## CHAPTER II.

### TENURES AND ESTATES IN GENERAL.

#### Cutts v. Commonwealth.

Decision by Supreme Judicial Court of Massachusetts, March Term, 1807. Opinion by Sedgwick, J.

*(Reported in 2 Mass. 284.)*

This case is brought before the court by a writ of error, which complains of a judgment of the court founded on a suit in favor of the commonwealth, against the plaintiff in error, instituted by the solicitor general, by the order of a special resolve of the legislature, in pursuance of the act passed June 18, 1791, "directing the manner in which inquests of office shall be taken to revert real estate in the commonwealth, or to entitle the commonwealth thereto."

This writ is grounded on the second section of the statute, which enacts that "in all other cases, where an inquest of office is necessary by law, to entitle the commonwealth to hold lands, tenements or hereditaments, such inquest shall be taken by the supreme judicial court in the county where such estate lies, upon information of the attorney-general, describing (among other things) the estate claimed, and the title set up thereto by the commonwealth."

As this is a prosecution instituted by statute, in which, from the nature of the subject, the government, the party plaintiff, is the whole people, against an individual or individuals, the party defendant,—and against whom the judges are inevitably interested,—it becomes important that none of the guards which the law has provided for the security of the defendant should be dispensed with. The statute, as recited, has rendered it necessary that the information should describe, 1st, the estate claimed by the commonwealth; and 2d, the title set up

thereto by the commonwealth. If the information on which the judgment was founded was deficient in describing the estate claimed by the commonwealth, or its title thereto, the judgment must be reversed: then —

1. Does the information describe the estate which the commonwealth claims in the demanded premises? By "estate" in land I understand the kind and *quantum* of interest therein. This interest may be a freehold, or of an inferior degree. A freehold may be of inheritance or for life. If of inheritance, it may be pure or base, absolute or conditional, in fee simple or fee tail. If fee tail, it may be general or special. If for life, it may be for that of the tenant or of another person, with or without impeachment of waste, absolute or conditional. If the estate be less than freehold, the term may be of greater or less duration, and with duties to the superior more or less burdensome. In short, an estate, in real property, is susceptible of every possible variation in which man can be related to the soil. When the government claims, against an individual, lands in his possession, it is proper that the law should provide, as this act does, that the "estate claimed," the kind and *quantum* of interest therein, should be described. Indeed, this is necessary, ordinarily, in controversies between private persons. Was this done by the information in this case? I think not. After describing the land to which claim is laid, the information says, "which tract of land the commonwealth are entitled to hold and possess." Here, certainly, the estate claimed by the commonwealth is not described. Nothing could have been less precise and more indefinite than the words "hold and possess," as descriptive of an estate in lands; they apply equally to many kinds of estates. The information gives no other description of the estate of the commonwealth in the lands demanded than by describing that derived from Sir William Pepperell. And there is no other estate intended to be described as derived from him but what is expressed by the allegation that he "was seised and possessed, and entitled to be seised and possessed, of the tract of land" demanded. Here, again, the words descriptive of the estate of Sir William are altogether vague and indefinite. The information, then, does not "describe" the estate, the kind and *quantum* of interest claimed in the land demanded.

2. The remaining question is, whether the title set up, by the information, to the lands demanded, is such as would authorize a judgment for the possession in favor of the commonwealth. The title set up is an act of the government, passed on the 30th of April, 1779, "to confiscate the estates of certain notorious conspirators," etc. In this act, among others, Sir William Pepperell is named; and it enacts "that all the goods and chattels, rights and credits, and lands, tenements, and hereditaments, of every kind, of which any of the persons before named were seised or possessed, or entitled to possess, hold, enjoy, or demand, in their own right, or of which any other person stood, or doth stand,

seised or possessed, or are, or were, entitled to have or demand, to and for their use, benefit, and behoof, shall escheat, inure, and accrue, to the sole use and benefit of the government and people of this state, and are accordingly declared so to escheat, inure, and accrue; and the said government and people shall be taken, deemed, and adjudged, and are hereby accordingly declared, to be in the real and actual possession of the goods, etc., lands, etc., without further inquiry," etc. To this there is a proviso, in these words: "Provided always, that the escheat shall not be construed to extend to, or operate upon, any goods, chattels, rights, credits, lands, tenements, or hereditaments, of which the persons aforementioned and described, or some other in their right and to their use, have not been seised or possessed, or entitled to be seised or possessed, or to have or demand, as aforesaid, since the 19th day of April, in the year of our Lord 1775."

From this recital it is manifest that, to derive a title to any lands, from the seisin or possession of a conspirator, named in the act, to the commonwealth, it was necessary, 1st, that the person from whom the title was derived should have been seised or possessed in his own right; and 2d, that such seisin or possession should have been since the 19th day of April, 1775, and before or at the time of passing the act. The act, however just or necessary, was certainly rigorous, and must therefore have a strict construction. Now the information does indeed say that Sir William Pepperell was seised and possessed of the land described; but it does not aver that it was in his own right. He might have been seised and possessed, in trust, or in the right of another, of the land demanded, and yet no title derived, by the act, to the commonwealth. Again, to derive a title from Sir William to the commonwealth, he must have been seised, since the 19th day of April, 1775, and before the 30th day of April, 1779. But the allegation in the information is, that prior to the 19th day of April, 1775, and since that time, he was seised and possessed. All this might be true, and yet the lands demanded not be confiscated by the act. The allegation may be all true, and yet the whole time within which the act required a seisin and possession, to give effect to the confiscation, excluded. The title set up, therefore, is wholly defective, and cannot be aided by the verdict.

I have not incumbered my opinion with a recital of the errors assigned by the plaintiff, because it was found to be unnecessary, from the view taken of the case by the court. We are all of opinion, for the reasons which I have stated, that the judgment must be reversed.

## CHAPTER III.

## FEE SIMPLE ESTATES.

**Adams v. Ross.**

Decision by Court of Errors and Appeals of New Jersey, June Term, 1860. Opinion by Whelpley, J.

*(Reported in 30 N. J. Law, 505.)*

This writ of error brings up for review the judgment of the supreme court, giving a construction to a deed, dated the 9th of September, 1854, between Anna V. Traphagen, of the first part, and Catharine Ann V. B. Adams, wife of Alonzo Whitney Adams, of the second part, by which the grantor, in consideration of natural love and affection and of one dollar, conveyed to the grantee the premises in the deed described. The operative words are "grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, for and during her natural life, and at her death to her children which may be begotten of her present husband; to have and to hold the above described premises unto the said party of the second part for and during her natural life, and at her death to her children which may be begotten of her present husband, Alonzo W. Adams."

The deed contains covenants of seisin, for quiet enjoyment, against incumbrances, for further assurance and of warranty.

These covenants are made by the grantor for herself and her heirs with the party of the second part, her heirs and assigns.

Mrs. Adams, at the date of conveyance to her, was a minor. On the 12th October, 1855, she, with her husband, executed a mortgage to secure the payment of \$6,000, in one year from date, upon the premises conveyed to her. She was then nineteen. The mortgage was to Ross, the applicant in the supreme court.

The Erie Railway Company, under the provisions of an act of the legislature, took a part of the land in question, and hold it in fee simple. The value of the land taken has been ascertained at \$3,061; that is now in the supreme court, to be awarded to the parties entitled to it, and who they are must depend upon the true construction of the deed.

What, then, are the rights of Mrs. Adams, her husband and children, one having been born of the marriage since the conveyance; and what if any, are the rights of Ross, the mortgagee, to the money in court.

The supreme court held that the estate granted by the deed was an estate in fee tail special in Catharine Adams and the heirs of her body by her present husband; that her husband was entitled to curtesy; that the mortgage to Ross on the interest of Mrs. Adams was void as to her, but was a lien upon the estate of her husband in case he survived her.

This decision was reached by interpreting the word "children," in the deed, as equivalent to "heirs," calling in the covenants in aid of that interpretation, as throwing light upon what the court called the intention of the grantor.

The supreme court was right in holding the first estate conveyed to Mrs. Adams not a fee simple; the express limitation of the estate to her during life, and after her death to her children, forbade any other conclusion. The covenant, warranting the land to her and her heirs general, cannot enlarge the estate, nor pass by estoppel a greater estate than that expressly conveyed. A party cannot be estopped by a deed, or the covenants contained in it, from setting up that a fee simple did not pass, when the deed expressly shows on its face exactly what estate did pass, and that it was less than a fee. *Rawle, Cov. 420; Blanchard v. Brook, 12 Pick. 67; 2 Co. Litt. 385b.*

Lord Coke expressly says: But a warranty of itself cannot enlarge an estate; as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heirs; yet doth not this enlarge his estate.

Justice Vredenburg, in his opinion, admits this to be law. He says, although the covenants cannot be used to enlarge the estate, yet they may be used to show in what sense the words in the conveying part of the deed were used. What is that but enlarging what would otherwise be their meaning? If without explanation they are insufficient to pass the estate, does not the explanation enlarge their operation?

The learned judge, in his elaborate opinion, says: From these covenants it is demonstrated that, by the terms "children by her present husband," the grantor intended the heirs of her body by her present husband. It follows, from this argument, that although the conveying part of the deed may not contain sufficient to convey the estate as a fee simple, for example, yet that if the covenants show an intent to pass a fee simple, it will pass.

The argument is, that the words of conveyance and covenant must be construed together. If the covenants look to the larger estate, that will pass upon the intent indicated. Children are said to be equivalent to heirs, because she warranted to her heirs; and the heirs are said to be not heirs general, because she called them children.

The inconsistency between the conveyance and covenant shows mistake in the one or the other. The safest rule of construction is that propounded by the supreme court; that the quantity of the estate conveyed must depend upon the operative words of conveyance, and not upon the covenants defending the quantity of estate conveyed.

Starting with that premise, it seems difficult, nay impossible, to reach the conclusion that the covenants are to be looked to in the interpretation of the conveyance, as such.

The covenants only attach to the estate granted or purporting to be

granted. If a life estate only be expressly conveyed, the covenantor warrants nothing more. The conveyance is the principal, the covenant the incident. If they do not expressly enlarge the estate passed by the operative words of the deed, I cannot perceive upon what sound principle of construction they can have that effect indirectly by throwing light on the intention of the grantor. In the construction of a deed of conveyance the question is, not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital showing the intention, will supply the omission, although it may preserve the rights of the party under the covenant for further assurance or in equity upon a bill to reform the deed.

The object of the covenants of a deed is to defend the estate passed, not to enlarge or narrow it. To adopt, as a settled rule of interpretation, that deeds are to be construed like wills, according to the presumed intent of the parties making them, to be deduced from an examination of the whole instrument, would be dangerous, and, in my judgment, in the last degree inexpedient. It is far better to adhere to the rigid rules established and firmly settled for centuries than to open so wide a door for litigation, and render uncertain the titles to lands. The experience of courts in the construction of wills, the difficulty of getting at the real intent of the party, where imperfectly expressed, or where he had none; the doubt which always exists in such cases, whether the court has spelt out what the party meant, all combine to show the importance of adhering to the rule that the grantor of a deed must express his intent by the use of the necessary words of conveyances, as they have been settled long ago by judicial decision and the writings of the sages of the law. Upon this point it is not safe to yield an inch; if that is done, the rule is effectually broken down. Where shall we stop if we start here?

Littleton says: Tenant in fee simple is he which hath lands or tenements to hold to him and his heirs forever. For if a man would purchase lands or tenements in fee simple, it behooveth him to have these words in his purchase: "to have and hold to him and his heirs." For these words, "his heirs," make the estate of inheritance. For if a man purchase lands by these words, "to have and to hold to him forever," or by these words, "to have and to hold to him and his assigns forever," in these two cases he hath but an estate for life, for that there lack these words, "his heirs," which words only make an estate of inheritance in all feoffments and grants.

"These words, 'his heirs,' do not only extend to his immediate heirs but to his heirs remote and most remote, born and to be born, *sub quibus vocabulis 'hæredibus suis' omnes hæredes, propinqui comprehenduntur, et remoti, nati et nascituri*, and *hæredum appellatione veniunt, hæredes hæredum infinitum*. And the reason wherefore the law is so precise to



prescribe certain words to create an estate of inheritance is for avoiding of uncertainty, the mother of contention and confusion." Co. Litt. 1a, 8b; 1 Shep. Touch. 101; Com. Dig., tit. "Estate," A, 2; Prest. Est. 1, 2, 4, 5; 4 Cruise, Dig., tit. 32, c. 21, cl. 1.

There are but two or three exceptions to this rule. The cases of sole and aggregate corporations, and where words of reference are used "as fully as he enfeoffed me." A gift in frank marriage, etc., which are to be found stated in the authorities already cited.

These exceptions create no confusion; they are as clearly defined and limited as the rule itself.

The word "heirs" is as necessary in the creation of an estate tail as a fee simple. 1 Co. Litt. 20a; 4 Cruise, Dig., tit. 32, c. 22, § 11; 4 Kent, Comm. 6; 2 Bl. Comm. 114.

This author sets this doctrine in clear light. He says: As the word "heirs" is necessary to create a fee, so, in further limitation of the strictness of feodal donation, the word "body," or some other word of procreation, is necessary to make it a fee tail. If, therefore, the words of inheritance or words of procreation be omitted, albeit the other words are inserted in the grant, this will not make an estate tail, as if the grant be to a man, and his issue of her body, to a man and his seed, to a man and his children or offspring, all these are only estates for life, there wanting the words of inheritance.

The rule in Shelley's Case, that when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, that always in such cases the word "heirs" are words of limitation, and not of purchase (Shelley's Case, 1 Coke, 93; 4 Cruise, Dig., c. 23, § 3, tit. 32), requires the use of the word "heirs" to bring it in operation.

No circumlocution has been ever held sufficient. It is believed no case can be found where this rule has been held to apply, unless the word "heirs" has been used in the second limitation.

Neither the researches of the learned judge who delivered the opinion of the supreme court, nor those of the very diligent counsel who argued the case here, have produced a case decided in England, or in any state of this Union abiding by the common law, where, in a conveyance by deed, the word "children" has been held to be equivalent to "heirs." That this has been determined in regard to wills is freely conceded, but that does not answer the requisition. The reasoning of the supreme court is, to my mind, entirely unsatisfactory. In the administration of the law of real estate, I prefer to stand *super antiquas vias, stare decisis*; to maintain the great rules of property; to adopt no new dogma, however convenient it may seem to be. The refined course of reasoning adopted in the face of so great a weight of authority rather shows what the law might have been than what it is.

I am utterly unprepared to overturn the common law, as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent, and all the judges who have administered it for three centuries, and to adopt the dogma that intention, not expression, is hereafter to be the guide in the construction of deeds. That would be as unwarrantable as dangerous.

Under this deed Mrs. Adams took an estate for life, which was not enlarged by the subsequent limitation to a fee tail. The remainder vested in Anna Adams, the child of the marriage, for life, subject to open and let in after-born children to the same estate.

The deed operated as a covenant to stand seized. The proper and technical words of such conveyance are, "stand seized to the use of," etc., but any other words will have the same effect, if it appear to have been the intention of the parties to use them for that purpose. The words "bargain and sell, give, grant and confirm" have been allowed so to operate. 4 Cruise, Dig., tit. 32, c. 10, §§ 1, 2.

By such a covenant an estate may be limited to a person not *in esse*, if within the considerations of blood or marriage. Fearn, Rem. 288; 1 Rep. 154, 2; 1 Prest. Est. 172, 176; Doe v. Martin, 4 Term R. 39.

This deed, on the face of it, expresses the considerations of natural love and affection, as well as the money consideration of one dollar.

It follows, from these considerations, that Adams is not entitled to curtesy in the lands on surviving his wife. The mortgage to Ross created no valid charge on the estate against Mrs. Adams, she being a minor when it was executed.

Mrs. Adams' interest in the land was subject to the provisions of the act for the better securing the property of married women, passed March 25, 1852; the deed to her was after this act passed.

This was clearly a gift or grant, within the meaning of the act. The legislature did not intend to limit the benefits of the act to property conveyed by a deed operating as a gift or grant; all the ordinary modes of acquiring property by deed were intended by the use of the terms gift, grant. The reasoning of Justice Vredenburg upon this point is conclusive. Upon the determination of the respective life estates, the land reverts to Miss Traphagen.

The judgment of the supreme court must be reversed. The money in court must be invested for the benefit of Mrs. Adams for life, and after her death for the benefit of the surviving children of the marriage in equal shares, during their respective lives, and at their deaths, respectively, their several shares must be paid to Miss Traphagen, or if she be then dead, to her heirs or devisees.

## CHAPTER IV.

## ESTATES IN FEE TAIL.

## Lehndorf et al. v. Cope.

Decision by Supreme Court of Illinois, September 28, 1887. Opinion by Shope, J.

*(Reported in 122 Ill. 317.)*

STATEMENT OF CASE.—James W. Humphrey, being the owner of the lands in controversy, bargained with Maria Anna Lehndorf for the sale thereof for \$5,100, and, joined by his wife, on the 3d day of August, 1883, by statutory form of warranty deed, in consideration of that sum, did “convey and warrant to Maria Anna Lehndorf, and her heirs by her present husband, Henry Lehndorf,” said lands. Two thousand dollars of the purchase-money was paid in hand, and two notes of Maria Anna Lehndorf were given for \$1,550 each, payable, with interest, to said Humphrey in twelve and twenty-four months, respectively. At the same time, and as part of the same transaction, a mortgage in statutory form was duly executed and delivered by said Maria Anna Lehndorf and Henry Lehndorf, her husband, upon the same lands, to secure the said two notes; all being done simultaneously, and as part of the same transaction. James W. Humphrey afterwards sold, indorsed and delivered the said notes to Allen Cope, defendant in error. On the 26th day of December, 1885, said Maria A., joining with her two sons, Paul and Albert Lehndorf, executed and delivered a deed conveying to Elizabeth Wirtz said lands. The first deed and mortgage mentioned were duly recorded August 8, 1883; the latter, December 26, 1885. The notes remaining unpaid after due, Cope, assignee thereof, filed this bill to foreclose the said mortgage, making Maria A. Lehndorf, Henry Lehndorf, her husband, Paul, Albert and William Lehndorf (children of Maria and Henry), and Elizabeth Wirtz, defendants.

The bill, after alleging the sale of the land by Humphrey to Mrs. Lehndorf, and making the deed, mortgage and notes exhibits, sets up the foregoing facts, and then proceeds: “At the request of said Maria A. Lehndorf, the said James W. Humphrey and his wife, Sarah F. C. Humphrey, conveyed and warranted said lands and real estate to her by the name and style of Maria Anna Lehndorf, and her heirs by her present husband, Henry Lehndorf, by a deed of conveyance bearing date of the said 3d day of August, 1883, duly recorded the 8th day of August, 1883, and hereto attached, marked ‘Exhibit A.’ Complainant submits that said Maria Anna Lehndorf can have no heirs while living, and that the words ‘and her heirs by her present husband, Henry Lehndorf,’ are surplusage in said deed, and that said Paul, Albert

and William Lehnendorf take no interest, either in law or equity, in said lands and real estate, by virtue of the same being incorporated, as aforesaid, in said deed of conveyance. And complainant further shows that said Paul, Albert and William Lehnendorf paid nothing of the purchase-money of said lands and real estate to said James W. Humphrey, and of any interest of said lands by virtue of said words, or otherwise. Such interest would be subject to the payment of the purchase-money of said lands and real estate, and subject to the rights and equities of your complainant to have said lands and real estate subjected to the payment of said purchase-money, so secured by said notes and mortgage as aforesaid. Complainant further shows that on, to wit, the 26th day of December, 1885, Maria Anna Lehnendorf, Paul and Albert Lehnendorf executed, acknowledged and delivered to one Elizabeth Wirtz, of St. Louis, Mo., a warranty deed of conveyance, purporting to convey and warrant said lands to said Elizabeth Wirtz, which said deed was duly recorded in said Marion county, in Record Book 41, page 55. Complainant charges, on information and belief, that said conveyance, so made by Maria Anna, Paul and Albert Lehnendorf to said Elizabeth Wirtz was without any consideration; that said Elizabeth Wirtz is the mother of said Maria Anna Lehnendorf, and that she paid nothing for said lands and real estate to said Maria Anna, nor to said Paul or Albert Lehnendorf, but said conveyance was made to embarrass in the collection of said notes. Complainant submits that, if said conveyance of said lands and real estate to said Elizabeth Wirtz was in good faith, the rights of said Elizabeth Wirtz, acquired by such conveyance, would be subject to the rights and equities of complainant in and to said lands and real estate." The bill prays for appointment of guardian *ad litem* for Paul, Albert and William Lehnendorf, who are alleged to be minors; that an account be taken of the amount due complainant on the mortgage; that, in default of payment, sufficient of the land be sold to pay the amount found due; that the rights and equities of the defendants be decreed subject to the equities of complainant; and that they be barred, etc., of equity of redemption.

The defendant Maria A. Lehnendorf answered, admitting the making of the deeds and mortgage, and that the notes mentioned and secured by the mortgage were part of the purchase-money; admits that it was agreed between her and said Humphrey that in making the conveyance of said land the deed should be made to Maria Anna Lehnendorf and her heirs by her present husband; that said deed was so made for the purposes in the deed expressed, and with the intent to so convey the land, and not otherwise; denies that she agreed to purchase and take a conveyance to herself, but that the deed was intended to convey said lands to her and her heirs by her husband, Henry Lehnendorf, and not otherwise; avers that the deed conveyed an estate for life to her in said lands, and the fee therein to her heirs of said Henry, and that Humphrey well

knew the same before and at the time of the execution of said deed; admits making notes as alleged and mortgage to secure the same, but denies that it was upon any interest in the land not owned by her; that said mortgage was intended to be only of her life estate, and Humphrey well knew the same and accepted the same with such knowledge and intent; avers that, if complainant is owner of the notes, he had them with notice that Maria Anna had purchased and taken by said deed only a life estate in said lands at the time and before he purchased said notes of said Humphrey; that Humphrey had taken and accepted a mortgage on her life estate for the security of said notes with full knowledge, and his assignee took no other or greater interest or right than he possessed; denies the right of complainant to other equitable relief; avers that Humphrey waived right to a lien in equity for the purchase-money by taking security by mortgage of life estate, and that upon the assignment of the notes he received pay and satisfaction of the purchase-money, and thereby any right of equitable relief for the purchase-money he might have had was lost; avers that her children by said Henry became and were owners in fee of said lands, as tenants in common, subject to the life estate in herself, and subject, also, to be opened to let in other child or children that may be born to the body of said Maria by her present husband, Henry Lehdorf, etc.

The defendants Paul, Albert and William Lehdorf, by their guardian *ad litem*, demurred to the bill, which was overruled by the court, and defendant Wirtz was defaulted. Decree was rendered foreclosing the mortgage, finding the interest of all of the defendants subject thereto, and decreeing accordingly.

The only evidence introduced, other than the deeds, notes and mortgage mentioned, was that of the scrivener who drew the deed and mortgage of August 3, 1883, who identified the notes as those given at the time for the purchase-money of the land; and it was shown, also, that Paul, Albert and William Lehdorf were the children of said Maria by her husband Henry Lehdorf; that all were minors. Two of them were born prior to the 3d day of August, 1883, and one since.

The defendants below prosecute this writ of error.

OPINION.—It is contended by appellee that by the deed of August 3, 1883, from Humphrey and wife to "Maria Anna Lehdorf, and her heirs by her present husband, Henry Lehdorf," Mrs. Lehdorf took a fee-simple estate in the lands conveyed; while appellants contend that she thereby took a life estate only, with remainder in fee to her children by said Henry Lehdorf. The deed, being statutory in form, contains no *habendum* limiting or defining the estate taken by Mrs. Lehdorf; and, although the deed must be held equivalent to one containing full covenants (Elder v. Derby, 98 Ill. 228), it is manifest that the estate granted would not be enlarged or restricted thereby. Such covenants are an assurance of the title granted to the grantees, whomsoever they

may be. If Mrs. Lehndorf took the fee, the covenants assure that estate to her; if she takes an estate in tail, the covenantor warrants to her a life estate, and the remainder in fee to whoever would take upon determination of her estate. Therefore, as said by counsel for appellee, the determination of the question depends upon a construction of the granting clause of the deed, which is that the grantors, in consideration, etc., "convey and warrant to Maria Anna Lehndorf, and her heirs by her present husband, Henry Lehndorf, of," etc., the lands in controversy.

The legitimate purpose of all construction of a contract or other instrument in writing is to ascertain the intention of the party or parties in making the same; and, when this is determined, effect will be given thereto, unless to do so would violate some established rule of property. The nature and quantity of the interest granted by a deed are always to be ascertained from the instrument itself, and are to be determined by the court as a matter of law. The intention of the parties will control the court in construction of the deed; but it is the intention apparent and manifest in the instrument, construing each clause, word, and term involved in the construction according to its legal import, and giving to each, thus construed, its legal effect. 3 Washb. Real Prop. 404; Boud v. Fay, 12 Allen, 88; Lippett v. Kelley, 46 Vt. 516; Price v. Sisson, 13 N. J. Eq. 169, 178; Caldwell v. Fulton, 31 Pa. St. 489; Wager v. Wager, 1 Serg. & R. 374. It cannot be presumed that the parties used words or terms in the conveyance without intending some meaning should be given them, or without an intent that the effect legitimately resulting from their use should follow; hence, if it can be done consistently with the rules of law, that construction will be adopted which will give effect to the instrument, and to each word and term employed, rejecting none as meaningless or repugnant.

We should, perhaps, first note the contention of counsel for appellee that, by virtue of section 13 of the conveyance act (as there is here no express limitation upon the estate of Mrs. Lehndorf, and as no one can have heirs while living), the words following the grant to her should be rejected, and the deed read as if to her only. This arises from a misapprehension of the statute. The evident purpose of the section referred to was to change the rule of the common law, whereby, if a conveyance, etc., was made without words of inheritance, an estate for the life of the grantee only was created. The section is as follows: "Sec. 13. Every estate in lands which shall be granted, conveyed, or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law." It is not necessary, as seems to be supposed, that, to create a less estate than the fee, there should be express words of lim-

itation, either under the statute or at common law. It is sufficient for that purpose if it appear by necessary implication that a less estate was granted.

In an early case (*Frogmorton v. Wharrey*, 2 W. Bl. 728), where there was a surrender of copyholds by R., who was seized in fee, to M., his then intended wife, and the heirs of their two bodies, etc., Wilmot, C. J., delivering the opinion of the court for himself, Bathurst, Gould, and Blackstone, JJ., after holding, on authority of *Gossage v. Tayler*, Style, 325, and *Lane v. Pannell*, 1 Rolle, 438, that the children thus begotten took as purchasers, and not as heirs, says the only difference in the cases is that in those cases "the wife had an express estate for life, and here not. But upon legal principle the cases are just alike. An estate 'to A. and the heirs of his body' is the same as an estate 'to A. for life, remainder to the heirs of his body.'" By operation of law, the added words created, in the case cited, in M. a life estate only, with remainder to the heirs of herself and R., as purchasers. So the grant "to A. and the heirs of his body," by operation of law, creates an estate tail in A.; remainder in tail. And this has been the uniform holding. The sixth section of the conveyance act provides that in cases where, by the common law, any person or persons might, after its passage, become seized in fee tail of any lands, etc., by virtue of any gift, devise, grant, or conveyance "hereafter to be made," or by any other means whatsoever, such person or persons, instead of being or becoming seized thereof in fee tail, shall be deemed and adjudged to be and become seized thereof for his natural life only, and the remainder shall pass, in fee-simple absolute, to the person or persons to whom the estate tail would, on the death of the first grantee or donee, pass according to the course of the common law, by virtue of such gift, devise or conveyance.

It is apparent if, at common law, by virtue of this conveyance, Mrs. Lehdof would take an estate tail, whether an estate-tail general or an estate-tail special, the thirteenth section would be inoperative, and by virtue of section 6 she would become seized of an estate for her life, with remainder in fee to those to whom the estate is immediately limited.

Estate tail came into general use upon construction by the courts of the *statute de donis conditionalibus* (13 Edw. I., c. 1); and, while no extended discussion will be necessary, an examination sufficient to determine if this case falls within the rules creating an estate tail will be proper. To create an estate in fee simple at common law, the grant must be to the grantee and his heirs, without limitation, to take from generation to generation in the regular course of descent. A tenant in fee simple is defined by Blackstone to be "he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever, generally absolutely, simply; without mentioning what heirs, but referring that to his own pleasure, or the disposition of the law." 2 Bl. Comm. 104.

Estates in fee tail were of two kinds: Estates-tail general, as where the grant was to one, and the heirs of his body generally, so that his issue in general, by each and all marriages, are capable of taking *per formam doni*; and estates-tail special, where the gift or grant was restricted to certain heirs, or class of heirs, of the donee's body. Id. 113, 114; 4 Kent, Comm. 11; 1 Washb. Real Prop. \*66. In a grant of lands words of inheritance were necessary at common law to the creation of a fee; but in the creation of a fee-tail estate more was required. There must also be words of procreation, indicating the body out of which the heirs were to issue, or by whom they were to be begotten. The ordinary formula was to make the gift or grant to the donee, as the grantee was called, "and the heirs of his body," or "her heirs upon her body to be begotten," or "upon her body to be begotten by A." But there was no special efficacy in these particular forms of words, and it was requisite only that, in addition to limitation to "heirs," the description of the heirs should be such that it should appear they were to be the issue of a particular person. 2 Bl. Comm. 114; 1 Washb. Real Prop. \*72; 2 Prest. Est. 478, and cases cited; 2 Jarm. Wills, 325.

The necessary words of inheritance are not here wanting to create a fee simple or fee tail at common law. The grant is to Mrs. Lehnendorf and her heirs, and, if the description had stopped here, a fee-simple estate would at common law have passed by the deed. The grant is not, however, to her and her heirs *simpliciter*, but to her and her heirs by a particular husband, and by necessary implication excludes the construction that heirs generally were intended. Heirs generally would include not only those designated, but children she may have, or have had by any other husband, as well as collaterals. Who, under the law, could be her heirs by her present husband except her children by him begotten? If the word "begotten" had been introduced before the preposition "by," so as that it would have read "her heirs begotten by her present husband," etc., it would have been no more certain that the issue of her body was intended. If it be conceded that equivalent words, which by necessary implication describe and designate the particular body out of which the heirs should proceed, would suffice to create an estate tail at common law, which seems to be done by the cases and text-writers, then the conclusion seems irresistible that such an estate was here created. "Her heirs by her present husband" could be no other than the issue of her body by him begotten; no other person or class of persons would answer the description, and they would and do fill it in every particular.

This precise point was ruled in *Wright v. Vernon*, 2 Drew. 439, where it is said: "The effect, therefore, of a limitation 'to the right heirs of Sir Thomas Samwell by a particular wife forever' is precisely the same as that of a limitation to the heirs of his body by that particular wife forever. The words 'of his body' are not in the least degree necessary



to this construction of the term 'heirs' or 'right heirs,' because, without their insertion, the full and absolute effect of them is involved in the description 'his right heirs by Mary, his second wife," which description limits the meaning of the term 'heirs' to heirs special, procreated by himself, as effectually and as necessarily as the words 'of his body' could do if they had been added." This was a case, it is true, arising upon a devise, in respect of which much greater latitude of construction is allowable than in the construction of deeds; but that consideration can in no way affect the weight of the authority upon the matter being considered.

It follows that Mrs. Lehnendorf would, at common law, be seized, by virtue of this conveyance, of an estate-tail special in the lands conveyed, and therefore, under the statute, would take an estate for her life only; and that, by virtue of the statute cited, the remainder vested in fee in her children by her said husband *in esse* at the time of making the deed,—subject, possibly, however, to be opened to let in after-born children of the same class. If no issue of her body "by her present husband" had been then living, the remainder would have fallen under Fearn's fourth and Blackstone's first definition of a contingent remainder; *i. e.*, when the remainder is limited "to a dubious and uncertain person." But, here, at least two of the children who would, under the statute, take the fee-simple estate upon the determination of the life estate, were in being when the deed was executed and delivered, and the remainder vested immediately in them in fee, subject to the possible contingency of being divested *pro tanto*, if opened to let in after-born children answering the same description. The person to whom the remainder is limited is ascertained; the event upon which it is to take effect is certain to happen; and, although it may be defeated by the death of such person before the determination of the particular estate, it is a vested remainder. "It is the uncertainty of the right of enjoyment which renders a remainder contingent; not the uncertainty of its actual enjoyment." Bl. Comm. ii, 169; Fearn, Rem. 149; 4 Kent, Comm. 203; Hawley v. James, 5 Paige, 467; Williamson v. Field, 2 Sandf. Ch. 533; Moore v. Lyons, 25 Wend. 144.

But it is said that the rule in Shelley's Case should be applied; but it will be seen that its application will produce the same result. That rule, as formulated by Jarman in his work on Wills (page 331), will best illustrate the position here. It is: "The rule simply is that where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word 'heirs' is a word of limitation; *i. e.*, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple." The rule operates upon the words of inheritance without affecting the words of procreation; so that if in any case the

word "heirs of his body," or other equivalents sufficient to create an estate tail, are used, a fee tail is vested in the first taker, and not the fee simple, as seems to be supposed. Therefore, if the rule be applied, Mrs. Lehdorf would at common law be seized of an estate in fee tail, and brought directly within the terms of section 6 of the conveyance act before cited. When, therefore, Mrs. Lehdorf, joined by her husband, mortgaged the land to Humphrey, it was not in her power to incumber the fee; and that estate passed to and vested in her two children then living, unincumbered by the lien created by the mortgage.

But it is said this mortgage was given for the purchase-money of the land, and that in some way, not clearly defined in argument, a lien therefor exists upon the estate conveyed. If it is intended thereby to insist that a vendor's lien exists, the answer to such a contention would be threefold. A vendor's lien upon real estate is a creation of the courts of equity, upon the equitable consideration that where the vendor has taken no security for the purchase-money, and done no act showing an intention to waive the lien, it is presumed that it was not the intention of the parties that one should part with, and the other acquire, the title, without payment of the purchase price of the land. It exists, if at all, independent of any contract,—is personal to the vendor; and whenever, from the circumstances, the court can infer that he did not rely upon the lien at the time of the sale, or subsequently abandoned it as security, it will be held to be waived. *Pom. Eq. Jur.; Cowl v. Varum*, 37 Ill. 184; *Richards v. Leaming*, 27 Ill. 432. Thus taking an independent security will discharge the lien. *Conover v. Warren*, 1 Gilman, 498.

It is manifest that when the deed and mortgage back to secure the purchase-money are parts of a single transaction, as in this case, one estate may be conveyed by the deed, and a wholly different interest conveyed by the mortgage; as if the fee be granted by the deed, and an estate for life or for years mortgaged. The power of the parties to so contract cannot be questioned. If the vendor saw proper to take security by mortgage upon less than the whole land, or upon less than the estate conveyed, for the unpaid purchase-money, there is no reason why it would not be a valid contract, and the residue of the land or estate pass by the deed unincumbered by any lien in his favor. But the bill in this case is for foreclosure of the mortgage given to secure the purchase-money, and proceeds upon the theory that in equity the mortgage attached to and became a lien upon the fee, which is alleged to be in Mrs. Lehdorf, and is to enforce the security under the contract,—a theory wholly inconsistent with the preservation of a vendor's lien.

Again, as before said, the lien created by implication in favor of the vendor is personal to him, and is not assignable or transferable, even by express contract between the vendor and an assignee. It can be enforced only by the vendor himself. *Richards v. Leaming*, *supra*;

Keith v. Horner, 32 Ill. 524; McLaurie v. Thomas, 39 Ill. 291; Markoe v. Andras, 67 Ill. 34; Moshier v. Meek, 80 Ill. 79. This is an established rule in equity, and is an insuperable obstacle to the enforcement of a vendor's lien by appellee. Such liens are secret; often productive of gross injustice to others dealing in respect of the property to which they attach; and courts of equity will not extend them beyond the requirements of the settled principles of equity.

But it is said that, the deed and mortgage being parts of the same transaction, the title would not vest as against the purchase-money; and the principle so often announced by this and other courts, that, in such case, there is no interregnum between the effective operation of the deed and mortgage in which judgment liens and the like can attach as against the mortgage security, is sought to be invoked. The doctrine can have no application to the facts of this case. It is true, as so often held, that in the case stated, the making and delivery of the deed and mortgage, being simultaneous and parts of one transaction, are to be construed as one act; *eo instante* upon the delivery of the deed the mortgage becomes effective, and the title passes to the mortgagor, subject to the lien of the mortgage. The mortgage attaches to the title conveyed in its transmission from the vendor and the vendee, and, obviously, is effective in arresting the passage of the title so far only as it reconveys the estate to the original vendor. Therefore, if, by deed, a life estate is conveyed to one, and the fee to another, and, as part of the same transaction, the life estate is mortgaged by the grantee thereof to the grantor, the mortgage would attach to the life estate, and the life tenant would take subject to the lien, and the fee would pass unaffected by the mortgage.

It is also insisted that the children of Mrs. Lehnendorf are mere volunteers, who paid nothing, and therefore, in equity, their interest should be subjected to the payment of this purchase-money. We know of no recognized principle of equity by which the case can be affected by that consideration. If it be conceded they paid nothing, it is apparent defendant in error has no such equity as should prevail against their title. It is not enough that they are not purchasers for value; the party questioning their title must show himself legally or equitably entitled to the relief. When defendant in error purchased the notes of Humphrey he had notice by the record of the state of the title; and that the mortgagor, in the mortgage given to secure them, had a life estate only in the lands mortgaged. He must be presumed to have known that the mortgage conveyed, subject to the condition of defeasance, the life estate of Mrs. Lehnendorf only; and also that the assignment of the notes, or of the notes and mortgage, could not transfer to him any equitable lien Humphrey might have had upon the fee in the land for the unpaid purchase-money. Two thousand dollars of the consideration was paid at the execution and delivery of the deed, but

by whom does not appear. If the children paid nothing, it was neither unlawful nor immoral for the parents, or either of them, to provide for the future welfare of their offspring by purchasing this land, and having the fee deeded to them, if done without fraud as to existing creditors, and with the knowledge and consent of their grantor. No fraud is alleged or shown, nor is it shown that the mortgage upon the life estate of Mrs. Lehdorf was or is inadequate security for the money remaining unpaid to defendant in error; but, if it was, it could make no difference. As we have seen, it is not purchase-money in his hands, in any sense in which a lien can be enforced in equity otherwise than by a foreclosure of the mortgage upon the estate and interest of which Mrs. Lehdorf was seized; that is, her life estate in these lands.

It appears by the bill that the deed was made to Mrs. Lehdorf, and her heirs by her present husband, etc., at her request. The grantor had full knowledge of the grant, and took back a mortgage to secure the unpaid purchase-money, executed by Mrs. Lehdorf and her husband only. Defendant in error purchased the notes with notice of the facts, as disclosed by the record, and, if he must lose because of the inadequacy of his security, he cannot complain.

The decree of the circuit court will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

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## CHAPTER V.

### CONVENTIONAL LIFE ESTATES.

#### **Merritt v. Scott et ux.**

Decision by Supreme Court of North Carolina, June, 1879. Opinion by Smith, C. J.

*(Reported in 81 N. C. 385.)*

The tract of land described in the complaint was in 1842 conveyed by James Merritt, the owner, to his son, John Merritt, in trust for another son, Francis Merritt, for life, remainder to his wife, Deborah, for life or widowhood, and with a further limitation over at her death or marriage to the children of Francis then living. John Merritt, the trustee, died intestate, leaving children, who, with the said Deborah, are the plaintiffs in this action. The life tenant Francis, who is also dead, in his life-time conveyed his estate to one John Cox, and after his death his administrator, under proceedings in the probate court and with license therefor, sold and conveyed the land to the defendant Edward Scott. The object of the suit is to recover the land for the use

of said Deborah, and damages for its detention since the death of Francis Merritt.

No issue as to title is made, and in the inquiry before the jury as to the damages, the defendant offered to show, in support of the defense set up in his answer, that valuable improvements had been made on the lands both by himself and the preceding occupant, in the erection of useful buildings, and by ditching, fencing and manuring, whereby the value of the land has been greatly enhanced. The evidence on objection from plaintiff was excluded, and the exception to this ruling of the court is the only point presented in the appeal.

Under instructions the jury assessed the damages from August 18, 1873, which we suppose to be the date of the determination of the first life estate, at the rate of \$100 per annum. Whether these improvements or any of them were made during the years for which the defendant is charged for rent does not appear.

We think it clear that improvements of any kind put upon land by a life tenant during his occupancy constitute no charge upon the land when it passes to the remainderman. He is entitled to the property in its improved state, without deduction for its increased value by reason of good management or the erection of buildings by the life tenant, for the obvious reason that the latter is improving his own property and for his own present benefit. This proposition is too plain to need the citation of authority.

For subsequent rents and uses he is entitled to have the amount reduced by those improvements. Suppose, while holding over, the defendant had by such improvements as in the answer are alleged to have been made, rendered the land more valuable, as it comes to the remainderman, would it not be reasonable he should pay a smaller rent than if nothing of the kind had been done? So if no repairs were made and the buildings had gone to decay, and by mismanagement and bad cultivation the farm had been abused and its value impaired, a full and larger rent might justly be required of the tenant.

The evidence of such improvements as were made by the defendant, after his estate expired and he became chargeable with rent, ought to have been admitted and considered by the jury in measuring the value of the rent, and in mitigation of damages. The evidence was competent for this purpose only, and not, in case the improvements were worth more than the rents, to constitute a counter-claim for the excess.

The rule is thus stated by Mr. Tyler: "The defendant should be allowed for the value of his improvements made in good faith, to the extent of the rents and profits claimed, and this is the view of the subject which is supported by the authorities." Tyler, Ej. 859.

Referring to the action for mesne profits which might be brought after a recovery in ejectment, Ruffin, C. J., uses this language: "The jury can then make fair allowance out of the rents, and to their extent,

for permanent improvements honestly made by the defendant, and actually enjoyed by the plaintiff, taking into consideration all the circumstances." *Dowd v. Faucett*, 4 Dev. 92.

Thus far the jury should have been allowed to hear and consider the evidence, in assessing the sum which the defendant should pay for the use of the premises, for it is quite apparent the improvements were made in good faith and will inure to the plaintiff's benefit.

As a counter-claim and to charge the land therewith when the estate in remainder is vested in Deborah, the evidence is totally inadmissible under the act of February 8, 1872. *Battle's Revisal*, c. 17, § 262a *et seq.* The act is not applicable to a case like this, but to independent and adversary claims of title, and was intended to introduce a just and reasonable rule in regard to them.

The owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession; and if it has been enhanced in value by improvements made under the belief that he was the owner, the increased value he ought not to take without some compensation to the other. This obvious equity is established by the act. But to enjoy its benefits, a party after judgment must file his petition and ask to be allowed for his permanent improvements, "over and above the value of the use and occupation of such land."

If the court is satisfied of the probable truth of the allegation, and the case is one to which the statute applies, and this must be preliminarily determined, it may suspend execution, and cause a jury to be impaneled "to assess the damages of the plaintiff and the allowance to the defendant" for his permanent improvements, "over and above the value of the use and occupation of the land."

This course has not been pursued, and the evidence is offered in the trial without any previous application to the judge, or his assent being obtained. But waiving the informality, we are not prepared to say the judge was in error in disallowing the evidence for the purpose of establishing a counter-claim for the excess. The defendant is entitled to have his claim for improvements made since the expiration of his own estate considered by the jury in estimating the value of the rents under appropriate instructions from the court in relation thereto. For this error in wholly rejecting the evidence there must be a *venire de novo*, and it is so ordered.

Error. *Venire de novo.*

**Keeler v. Eastman.**

Decision by Supreme Court of Vermont, January, 1839. Opinion by Bennett, Chancellor.

*(Reported in 11 Vt. 293.)*

STATEMENT OF CASE.—The orator's bill stated, in substance, that Seba Eastman, in October, 1828, executed a lease of a certain farm, described in the bill, to the defendant and his wife, during their natural lives, and afterwards, in February, 1832, conveyed his reversionary interest in the farm to the orator. The bill then alleged that the defendant had committed waste on the premises, and especially upon a sugar orchard, by cutting down and carrying away and selling the wood and timber growing thereon, and concluded with a prayer for an injunction to stay further waste, and that the defendant might be decreed to account to the orator for such as had been committed. The substance and amount of the testimony will appear from the opinion of the court.

OPINION.—The great subject of complaint seems to be the destruction of the sugar orchard, which it alleged has been cut down and destroyed since the orator became possessed of the reversionary interest in February, 1832. It is unnecessary to go into the particulars of the evidence, which is quite voluminous, and is evidently somewhat contradictory; but suffice it to say that it seems to be pretty well established from the current of the testimony that the principal part of the chopping in the sugar orchard was prior to the winter of 1832, and this too by Seba Eastman and Charles Eastman, while Seba had the reversionary interest. The whole evidence taken together satisfies the court that the farm, on the whole, has been managed by the tenant for life in a prudent and husband-like manner; and that there have been no acts of wantonness on the part of the defendant, or disregard to the ultimate value of the reversionary interest. Indeed, the value of the property seems to have been enhanced by the betterment and good husbandry of the defendant. We are not aware of any decisions in the courts of this state laying down any precise rules establishing what acts shall constitute waste; and, indeed, it is difficult there should be any. The general principle is that the law considers everything to be waste which does a permanent injury to the inheritance. Coke Litt. 53, 54; Jacob's Law Dic., vol. 6, 393, tit. Waste; 7 Com. Dig., tit. Waste.

By the principles of the ancient common law many acts were held to constitute waste—such as the conversion of wood, meadow or pasture into arable land, and of woodland into meadow or pasture land—to which we might not, at the present day, be disposed to give that effect. These principles must have been introduced when agriculture was little understood, and they are not founded in reason, and many of them are inconsistent with the most important

improvements in the cultivation of the soil. In England that species of wood which is designated as timber shall not be cut, because the destruction of it is considered an injury done to the inheritance; and, therefore, waste. From the different states of many parts of our country a different rule should obtain in our courts; and timber may and must, in some cases to a certain extent, be cut down, but not so as to cause damage to the inheritance. To what extent a tenant for life can be justified in cutting wood before he shall be guilty of waste must depend upon a sound discretion applied to the particular case. It is not in this state waste to cut down wood or timber so as to fit the land for cultivation, provided this would not damage the inheritance, and would be according to the rules of good husbandry, taking into view the location and situation of the whole farm. So, to remove the dead and decaying trees, whether for the purpose of clearing the land, or giving the green timber a better opportunity to come to maturity, is not waste. We are satisfied that when the wood or timber is cut with this intent, and is according to a judicious course of husbandry, the tenant is not guilty of waste, though the wood or timber so cut may have been sold or consumed off the farm. This farm, it is to be remembered, is comparatively in a state of nature, and the town in which it is situated comparatively new; and what might constitute waste, as applied to one farm in one place, might not, when applied to another in a different place.

Though the evidence is somewhat contradictory, we are not satisfied that the defendant has gone beyond his rights. The orator's bill is therefore dismissed. But inasmuch as the defendant has made declarations claiming the right to cut off all the wood and timber from the farm if he chose to do it, and threatened the doing of it, the bill was not brought without some apparent cause, and the defendant in this particular is not without fault; it is therefore dismissed without costs.

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## CHAPTER VI.

### LEGAL LIFE ESTATES.

#### Bozarth et al. v. Largent.

Decision by the Supreme Court of Illinois, April 5, 1889. Opinion by Shope, J.

(*Reported in 128 Ill. 95.*)

This was an action of ejectment, brought by James Bozarth, Mary L. Bozarth, and Ida B. Cook, the heirs at law of Louisa Bozarth, deceased, against William Largent, for the recovery in fee of the E.  $\frac{1}{4}$  S. W.  $\frac{1}{4}$  of



section 17, and the W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 8, all in township 23 N., range 2 W. of the third P. M., in Tazewell county. General issue was filed, and a trial had, resulting in a finding and judgment for defendant. Plaintiffs below prosecute this writ of error. The facts are as follows: Louisa Bozarth, now deceased, being the owner in fee of said lands, which she had inherited from her father, was, on August 19, 1863, married to Asa Bozarth. They lived together as husband and wife until November 1, 1868, when she died intestate, leaving her husband, who is still living, and the plaintiffs, her children and only heirs at law, surviving her. On March 5, 1868, she and her husband executed their mortgage upon the lands in controversy, and other lands of the husband, to Anna R. Colhrs, to secure the payment of \$2,500 evidenced by the note of Asa Bozarth, the husband, payable two years after date, with ten per cent. interest, payable annually, and containing a clause that, in default of the payment of the annual interest, the principal should become due. The mortgage was in the usual form, and contained a release of all homestead rights; and the wife acknowledged the release of all her rights of homestead, but the husband did not acknowledge the release of homestead, his acknowledgment being simply that he acknowledged the mortgage to be his free act and deed for the uses and purposes therein set forth. On March 27, 1873, Mary C. Maus, the assignee of said note and mortgage, filed her bill in the circuit court of Tazewell county against the said Asa Bozarth, and the plaintiffs and others, for the foreclosure of said mortgage. Summons was duly served on all the defendants, and a guardian *ad litem* was appointed for James, Ida B., and Mary Bozarth, the plaintiffs, they being then minors, who answered. At the May term, 1873, a decree was entered foreclosing said mortgage, and finding due thereon the sum of \$2,973.75, and a solicitor's fee of \$125, provided for in the mortgage, and ordering a sale of the premises, etc. Sale was made under said decree July 12, 1873, to William Don Maus, for the sum of \$3,048.84. The sale was made *en masse*, the master having failed to obtain bids on the several tracts when separately offered. Certificate of purchase was made and recorded the same day. At the May term, 1874, of the McLean circuit court, Albert Welch recovered a judgment against the said Asa Bozarth, John Bozarth, and Elihu Bozarth for \$1,250.50 and costs. Execution was issued to the sheriff of McLean county, and returned August 19, 1874, when Welch assigned the judgment to George W. Thompson. On the same day an *alias* execution issued to the sheriff of Tazewell county, which came to that officer's hands August 20, 1874, and was levied on all the land sold under the foreclosure decree, and a certificate of levy was filed and recorded August 31, 1874. On October 10, 1874, a certificate of redemption from the sale under the decree of July 12, 1873, was executed by the sheriff of Tazewell county, and recorded the same day. On October 31, 1874, the land was sold *en masse* by the sheriff to Welch

for redemption money and costs. On January 14, 1875, after the term of office of the sheriff had expired, he made and delivered to Welch a deed for the premises, dating the same as of the day of sale. On the same day, Pratt, the then sheriff, also executed a deed to Welch for the lands on the same sale. Welch and wife, by their deed of December 1, 1875, conveyed the land to John Bozarth, and he, on May 22, 1882, conveyed the same to William Largent, defendant in error, who went into possession of the same.

At the common law a husband held in right of his wife all her lands in possession, and owned the rents and profits thereof absolutely. 1 Washb. Real Prop. 276; Tied. Real Prop., § 90; Haralson v. Bridges, 14 Ill. 37; Clapp v. Inhabitants of Stoughton, 10 Pick. 463; Decker v. Livingston, 15 Johns. 479. The birth of issue was not necessary to this right of the husband, which continued during the joint lives of the husband and wife. It was called an estate during coverture, or the husband's freehold estate *jure uxoris*. Kibbie v. Williams, 58 Ill. 30; Butterfield v. Beall, 3 Ind. 203; Montgomery v. Tate, 12 Ind. 615; Croft v. Wilbar, 7 Allen, 248. It differed from curtesy initiate in its being a vested estate in possession, while the latter is a contingent future estate, dependent upon the birth of issue. Wright's Case, 2 Md. 429-453. It is held in right of the wife, and was not added to or diminished when curtesy initiate arose. Subject to the husband's beneficial enjoyment during coverture, the ownership remained in the wife, and, on dissolution of the marriage, was discharged from such estate of the husband. Stew., Husb. & W., § 146. Where there was marriage, seisin of the wife, and birth of issue capable of inheriting, the husband, by the common law, took an estate in the wife's land during coverture. This was an estate of tenancy by the curtesy initiate, and which would become consummate upon the death of the wife in the life-time of the tenant. A tenant by the curtesy was seised of an estate of freehold, which was subject to alienation, and was liable to be taken on execution for his debts. Tied. Real Prop., § 101; Howey v. Goings, 13 Ill. 95; Jacobs v. Rice, 33 Ill. 369; Cole v. Van Riper, 44 Ill. 58; Beach v. Miller, 51 Ill. 206; Lang v. Hitchcock, 99 Ill. 550.

The act of 1861, known as the "Married Woman's Act," provides: "That all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman during coverture acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control or interference of her husband, and

shall be exempt from execution or attachment for the debts of her husband." In this case, Louisa Bozarth, who was common source of title, was the owner of the land in controversy, as it is conceded, at the time of her marriage, August 19, 1863, to Asa Bozarth. The marriage having taken place after the act of 1861 took effect, and the wife being then the owner of the land in question, it was not, during her coverture, subject to the control, interference or disposal of her husband, or liable for his debts or other obligations. The effect of the statute was to abrogate the husband's estate in her lands, or the estate he would have had at common law during the coverture, and consequently during that period he had no estate therein liable to execution or attachment. The act did away with the estate he would have had at common law, growing out of the mere marital relation, and of his curtesy initiate; and it therefore follows, if the wife had been living at the time of the redemption and sale by the creditor of her husband, that proceeding would not have divested any right of herself or husband, nor conferred any right upon the purchaser.

The question, however, remains whether Asa Bozarth, the husband, on the death of his wife in 1868, acquired an estate in her land as tenant by the curtesy. We have already seen that the property of a married woman, under the act of 1861, notwithstanding her marriage, was to be and remain during coverture her sole and separate property, and was not subject to the husband's control, or liable for his debts. The general effect of statutes of this kind is to destroy the marital rights of the husband in his wife's estate; but a statute may exempt her property from his debts without in any way destroying his rights therein. Unless tenancy by the curtesy is destroyed by the statute by express words or necessary implication, or by the wife's disposition of her property by virtue of her power over it, he will be held to have an estate by the curtesy at her death. The prevailing opinion seems to be that while separate property acts do suspend during coverture all the rights of a husband, or his creditors, in statutory separate property, they do not destroy curtesy, or prevent its vesting on her death, unless such an event is clearly excluded by the statute; as where the statute not only provides that the property of the wife shall be hers, etc., but also defines her husband's interest therein, if she dies intestate, in which case curtesy is excluded. Where she has power to alienate or charge her property, she may thereby defeat curtesy, but the statute must contain express words to enable her to convey alone; and, also, when she has power of disposition of the property by will she may thereby defeat curtesy. *Stew. Husb. & W.*, §§ 161, 243; *In re Winne*, 2 *Lans.* 21; *Hatfield v. Sneden*, 54 *N. Y.* 280; *Noble v. McFarland*, 51 *Ill.* 226; *Freeman v. Hartman*, 45 *Ill.* 57; *Cole v. Van Riper*, *supra*.

It will be seen that the married woman's act of 1861 does not attempt to define the husband's rights in his wife's property after her decease, nor

does it give her any power to dispose of her separate property, independent of the husband. The purpose and effect of the statute were to secure to the wife the control of her separate property during coverture. During that period the husband's common-law rights in her property are suspended. We are of opinion that this act did not have the effect of destroying the estate by curtesy, but that, after the passage of that act, and prior to the passage of the act of 1874, the husband, on his wife's death, leaving issue of marriage, took a life estate in her land as tenant by the curtesy. After the passage of the act under consideration, the estate by the curtesy in the lands of the wife did not vest in the husband until the death of the wife (*Lucas v. Lucas*, 103 Ill. 121; *Beach v. Miller*, 51 Ill. 206); but upon her death such estate became consummate, and vested in the husband in all respects as at common law (*Noble v. McFarland*, Id. 226; *Shortall v. Hinckley*, 31 Ill. 219; *Gay v. Gay*, 123 Ill. 221, 13 N. E. R. 813; *Castner v. Walrod*, 83 Ill. 171). It follows that we are of opinion that upon the death of the wife in 1868, leaving issue surviving, the husband, Asa Bozarth, became seised of a freehold interest in the lands in controversy as tenant by the curtesy, and which was subject to seizure and sale on execution against him.

The validity of the sale of the premises under the decree of foreclosure, and the redemption upon the execution issued upon the judgment in favor of Welch, and against the said Asa Bozarth, and the sale thereunder, are questioned by plaintiff in error. If the foreclosure sale was void for any cause, the judgment creditor redeeming therefrom acquired no title under his purchase, for the reason that his rights, like those of the purchaser at the sale under the decree of foreclosure, are dependent upon a valid judgment or decree and sale. *Johnson v. Baker*, 38 Ill. 99; *Mulvey v. Carpenter*, 78 Ill. 580; *Keeling v. Heard*, 3 Head, 592.

It is objected that there was no sufficient service of summons upon the plaintiffs in error, who were defendants in the foreclosure suit. The return to the summons therein is as follows: "Executed this writ by reading the same to the within-named Asa Bozarth, James Bozarth, Ida Bell Bozarth, and Mary Bozarth, and by delivering to each a true copy hereof, on the 10th day of April, 1872," and properly signed by the sheriff. The process was returnable to the May term, 1873. The service was in apt time. The fact that the summons was read to the defendants did no harm, and that part of the return may be disregarded. It is apparent that the circuit court had, therefore, jurisdiction of the subject-matter and of the parties, and mere errors or irregularities, if any, cannot be taken advantage of in this collateral proceeding.

It is objected that the mortgaged premises were improperly sold *en masse*. If this be conceded, it would not render the sale void; at most, it would only be ground for setting the sale aside on proper application to the court in apt time. It however appears that the land was offered

by the master in separate parcels, and, receiving no bids therefor, it was then offered and sold *en masse*. We are not prepared to say that the action of the master was not warranted.

It is next objected that all the lands sold under the decree were redeemed *en masse*, and so sold to Welch under the execution. A judgment creditor's right of redemption is no greater or more extensive than that of the original debtor. He cannot redeem in a case where the original owner cannot redeem, and within the time allowed by law for redemption by the debtor. In *Hawkins v. Vineyard*, 14 Ill. 26, a quarter-section of land had been sold, of which the debtor owned only sixty-five acres and it was held he could not redeem the sixty-five acres, but that he must redeem the whole or none. A person cannot redeem an undivided share of land by paying his proportional share of the debt; and a part owner must redeem the whole. *Durley v. Davis*, 69 Ill. 133. A purchaser of a part of mortgaged land cannot redeem that part by paying his proportion of the debt. *Meacham v. Steele*, 93 Ill. 135. When the purchaser at a master's sale of an entire tract of land afterwards assigns an undivided interest in such purchase, there can be no legal redemption of such undivided interest by a judgment creditor. *Groves v. Maghee*, 72 Ill. 526; *Titsworth v. Stout*, 49 Ill. 78. Section 25, chapter 77, Revised Statutes, provides: "Any person entitled to redeem may redeem the whole or any part of the premises sold in like distinct parcels or quantities in which the same were sold." If the several mortgaged tracts had been sold separately, redemption might have been made of any one or more of the tracts. In such case the amount that each tract sold for would furnish the basis for determining the amount to be paid in order to redeem; but, as the several parcels of land were sold together, and for a gross sum, neither the debtor nor his judgment creditor could redeem without paying the full amount for which the same sold, with interest. The law gives the debtor twelve months in which to redeem, after which time any judgment creditor of the debtor may also redeem within fifteen months from the date of the sale; but, in so doing, the creditor will possess no greater right than his debtor had within the time limited for redemption by him. After the expiration of twelve months from the sale, the right of redemption of the judgment debtor is gone. He no longer has any interest in the premises and cannot take advantage of mere irregularities in making redemption by his judgment creditor, and his acquisition of title by virtue of a sale in pursuance of such redemption. The purchaser at the foreclosure sale makes no objection to the validity of the redemption, and, having accepted the money, the redemption was complete. The title of Asa Bozarth being gone by his failure to redeem within the time allowed by law, he was not injured by a sale *en masse* on the execution, if, indeed, the sale could have been otherwise made.

There is no force in the objection that the redemption should have

been made in the name of Thompson, assignee of Welch, the judgment creditor. *Swezey v. Chandler*, 11 Ill. 445. It in no way concerns the plaintiffs in error whether redemption was made in the name of the plaintiff in the judgment against Asa Bozarth or in the name of his assignee. No proof was made or offered at the trial tending to show that the premises, when sold under the decree of foreclosure, or when the mortgage was given, were occupied by the mortgagors, or either of them, as a homestead; nor does it appear that they were at any time so occupied. Therefore, the question of the right of homestead was not presented for adjudication, and cannot now be considered in this court. It may, however, be observed that the mortgage was executed and acknowledged before the act of 1872, relating to conveyances, took effect, and the cases cited by counsel were determined under the provisions of that act.

It is claimed that only the title of Louisa Bozarth passed by the sale under the decree of foreclosure, and therefore a creditor of her husband could not redeem from that sale. This contention is not well grounded. While the husband, as we have seen, at the time of the execution of the mortgage had no estate in the land, it was necessary to the execution of a valid mortgage or conveyance of his wife's estate therein that he should join in the mortgage or conveyance, which he did. The mortgage was in the usual form, and contained covenants of both the husband and wife of good right to convey, seisin in fee and of general warranty, and was sufficient to pass not only the estate of the wife, but also all the estate, right and interest of the husband in the property, which he then had or might subsequently acquire. If he had no estate by the curtesy initiate or otherwise during the life of the wife, upon her death he took an estate for life in this land as tenant by the curtesy, which, under the covenants of the mortgage, inured to the benefit of the mortgagor. *Gochenour v. Mowry*, 33 Ill. 331. The sheriff's deed was dated October 31, 1874, the date of the sale upon the redemption, but was, in fact, executed January 14, 1875, after the term of office of the sheriff had expired. Section 21 of the act relating to judgments, etc., provides that the redeeming judgment creditor shall be considered as having bid at the sale the amount of the redemption money paid by him, with interest thereon, and the costs of the redemption and sale; "and, if no greater amount is bid at such sale, the premises shall be struck off to such person making such redemption, and the officers shall forthwith execute a deed of the premises to him, and no other redemption shall be allowed." It is urged that the provision of the statute requiring the deed to be made "forthwith" is mandatory, and that a failure in this respect would render the sale void. We are not prepared to so hold. The purchaser is entitled to a deed forthwith in such case, but the failure of the sheriff to make the deed immediately after the sale will not render the redemption and sale invalid. This provision of the statute must be regarded as directory only.

It is lastly objected that Reeves, the sheriff, had no authority to make the deed after his term of office had expired. Section 30 of the act relating to judgments, etc., provides: "The deed shall be executed by the sheriff, master in chancery, or other officer who made such sale, or by his successor in office," etc. Freeman, in his work on Execution (section 327), says: "The officer who made the sale, whether he continues in office or not, is, in ordinary circumstances, and in the absence of statutory provisions to the contrary, the proper person to make the conveyance. . . . When the term of the officer who made the sale terminates, his power to make the conveyance continues. In fact, unless the new sheriff is specially authorized by statute, he seems to have no authority whatever to make a conveyance based on a sale made by his predecessor."

We are of opinion that the deed made by the retiring sheriff, under our statute, was valid. If this is so, it will be unnecessary to determine whether the deed made by his successor in office is good or not. In any event, under the section of the statute quoted, by one deed or the other, the title acquired under the redemption sale passed to the grantee in said deeds. The plaintiffs claimed an estate in fee in the land in controversy, with a present right of possession. Their father having a life estate in the property, which has passed by virtue of the foreclosure sale, the redemption and sale thereunder, and the deed in pursuance thereof to the defendant, they are not entitled to recover of the defendant the possession of said lands during the continuance of such estate. Until the termination of that life estate by the death of the life tenant, their right to a recovery must be postponed. Some questions are raised as to the effect of the proceedings before mentioned upon the fee to the land which are not now before us for consideration, and no adjudication is made in respect thereof. The judgment of the circuit court will be affirmed.

### Stanwood v. Dunning et al.

Decision by Supreme Judicial Court of Maine. 1837. Opinion by Emery, J.

*(Reported in 14 Me. 290.)*

The only question in this case is whether, on the facts legally and properly proved, David Stanwood had such seisin of the premises as could entitle the demandant to dower. Premising that family settlements made without fraud are justly entitled to the favorable consideration of courts, we proceed to suggest our ideas of the merits of the case as disclosed in the agreed statement of facts. The claim of dower, it has long been said, is to be favored. Still unless the husband were legally and beneficially seised of the estate during the coverture, the

wife is not entitled to dower. But if the land vests in the husband but for a single moment beneficially for his own use, the wife shall be endowed.

It is said that the case cited by plaintiff from Cro. Eliz. 503, which is *Broughton v. Randall*, is differently reported in Noy, 64. In Cro. Eliz. it is said the title of the *feme* to recover dower was that the father and son were joint tenants to them and the heirs of the son; and they were both hanged in one cart; but because the son, as was deposed by witnesses, survived, as appeared by some tokens, viz., his shaking his legs, his *feme* thereupon demanded dower, and upon this issue, *nunques seizu* dowers, this matter was found for the demandant.

In 1 Rop. Prop. 369, the case of *Broughton v. Randall* is thus stated: A father was tenant for life, remainder to his son in tail, remainder to the right heirs of the father. Both of them were attainted of felony and executed together. The son had no issue, and the father left a widow. Evidence was given of the father having moved or struggled after the son, and the father's widow claimed dower of the estate, and it was adjudged to her. The principle appears to be this: that the instant the father survived the son, the estate for life of the father united with the remainder in fee limited to him upon the determination of the vested estate tail in the son, so that the less estate having merged in the greater, the father became seized of the freehold and inheritance for a moment during the marriage, to which dower attached itself.

But if the instantaneous seisin be merely transitory, that is, when the very same act by which the husband acquires the fee takes it out of him, so that he is merely the conduit for passing it, and takes no interest, such a momentary seisin will not entitle his widow to dower.

An illustration is given in the English books, that if lands be granted to the husband and his heirs by a fine, who immediately by the same fine renders it back to the consor, the husband's widow will not be entitled to dower of such an instantaneous seisin. *Dixon v. Harrison*, Vaughan, 41; Cro. Car. 191; Co. Litt. 31.

In this case, the marriage, death of the husband, and demand of dower are admitted, but his seisin is denied.

Without going into an examination of the law relating to the four species of fines used in England, we may remark that it is considered there as one of the most valuable of the common assurances of that realm, being in fact a fictitious proceeding to transfer or secure real property by a mode more efficacious than ordinary conveyances. 1 Co. Litt. 121a.

But to show how this mode of passing property bears on the seisin of the husband, so far as instantaneous in the case of a fine, compared with it in case of bargain and sale, the case of *Nash v. Preston*, Cro. Car. 191, is not inappropriate. It was a bill in chancery. "J. S., being seised in fee, by indenture enrolled, bargains and sells to the husband



for £120, in consideration that he shall re-demise it to him and his wife for their lives, rendering a peppercorn; and with a condition that if he paid the £120 at the end of twenty years the bargain and sale shall be void. He re-demiseth it accordingly and dies; his wife brings dower. The question was whether the plaintiff shall be relieved against this title of dower. Jones, J., and Croke, to whom the bill was referred, conceived it to be against equity and the agreement of the husband at the time of the purchase that she should have it against the lessees, for it was intended that they should have it re-demised immediately to them as soon as they parted with it; and it is but in nature of a mortgage; and upon a mortgage, if land be re-demised, the wife of the mortgagee shall not have dower. And if a husband take a fine *sur cognizance de droit comme ceo*, and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him, *quasi uno flatu*, and by one and the same act. Yet in this case they conceived that by the law she is to have dower; for, by the bargain and sale, the land is vested in the husband, and thereby his wife entitled to have dower; and when he re-demises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her dower, for it is against the rule of law, viz., "where no fraud or covin is, a court of equity will not relieve." And upon conference with other the justices at Serjeant's Inn, upon this question, who were of the same judgment, Jones and Croke certified their opinion to the court of chancery "that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof."

The case of *Holbrook v. Finney*, 4 Mass. 566, recognizes that which we have just recited as sound law.

In the case now under discussion the deed from William Stanwood to David Stanwood bears date the 1st of March, 1824, is acknowledged on the 6th of the same month, and recorded March 16, 1824. It is a deed of bargain and sale to said David in fee for the consideration of love and affection with general warranty.

The deed from David Stanwood to Charles Stanwood is dated the 6th of March, 1824, acknowledged the same day, and recorded March 11, 1824. But if requisite so to examine in order to help to a decision, it is manifest from inspecting the deed from William to Charles Stanwood that in the order of time the deed to David from William was made first, and then it is apparent that David became rightfully seised in fee, and beneficially so, though for a short time.

The fee was not rendered back by David to William, *quasi uno flatu*, and therefore the demandant is entitled to dower. It is agreed that the object of the father was to divide his estate among his sons. Noth-

ing could more strongly evince the propriety of leaving the law to raise the future benefit to the wife of David in dower after his decease, if his notorious insolvency might put at hazard the beneficial continuance of the property in him during his life.

The questions about the admissibility of any other evidence of former or subsequent agreements and conversations it is unnecessary to examine further than to say that those which preceded the deed of William to David were merged in that conveyance. And the subsequent agreements and conversations do not abridge the plaintiff's right. But we reject them. The purchasers under Charles Stanwood are estopped to deny the seisin of David. *Kimball v. Kimball*, 2 Greenl. 226.

Upon every view of which the case is legally susceptible, on the facts legally and properly proved, we are satisfied that David Stanwood had such seisin of the premises as would entitle the demandant to dower.

The defendants must be defaulted.

### Warren v. Warren et al.

Decision by Supreme Court of Illinois, October 26, 1893. Opinion by Magruder, J.

*(Reported in 148 Ill. 641.)*

The original bill in this case was filed on September 24, 1890, by the appellant, Eliza A. Warren, the widow of Alpha Warren, who died testate on November 12, 1888, against John H. Warren in his own right, as the son of Alpha Warren by a former wife, and as executor of the will of said Alpha Warren. Appellant was married to Alpha Warren on June 15, 1875, and was at that time a widow having a daughter by a former husband, but never had any children by Alpha Warren, his only child being said John H. Warren. After answer filed, the bill was amended by making the children of John H. Warren defendants. Subsequently, on October 4, 1892, a supplemental bill was filed by appellant against said John H. Warren and his children. The questions in the case arise upon the issues made by the answers to the supplemental bill and the replications to such answers. The supplemental bill prays for an allotment of dower and homestead; for an accounting by the trustee and executor; for a disallowance of certain payments made by him for special assessments and special taxes levied against real property of the estate in Rockford; for removal of the trustee, and for general relief, etc. The answers deny that complainant is entitled to any of the relief asked for, and set up release and settlement by her, and payment to her and receipt by her of one-third of the balance of the rents and interest given to her by the will, etc. The decree of the circuit court finds that the will of Alpha Warren was admitted to probate on November 15, 1888; that John H. Warren entered upon the

duties of executor and trustee thereunder; that complainant affirmed said will, and did not relinquish any of the provisions thereof, and is not entitled to either dower or homestead in the lands of her deceased husband; that the personal estate has been and will be exhausted in payment of widow's award, claims allowed, and the compensation of the trustee to be allowed; that since the testator's death the city of Rockford has carried on proceedings by special assessment for the improvement of public streets and the construction of public sewers; that such assessments against the lands of the testator amount to \$1,441; that complainant has been wrongfully charged with one-third thereof, to wit, \$480.33; that under the will she is only charged with one-third of the ordinary taxes and repairs. The decree orders that John H. Warren pay to complainant said sum of \$480.33, with five per cent. interest, and certain costs, within forty days, etc., and have execution therefor, and that the question of the executor's compensation be reserved, etc.

The will of Alpha Warren appoints his son his "executor to settle and manage my estate, and also my trustee to hold and keep my estate intact during his natural life-time:" and, after providing for the payment of debts and funeral expenses out of the personal property, it proceeds as follows: "I direct that the annual income of my estate, personal and real, shall be used as follows: My executor and trustee shall be entitled to and shall receive a reasonable compensation for his services. The annual taxes and insurance, and also all reasonable repairs and improvements, shall be provided for out of the annual rents and interest; and of the annual income not used for the purposes above named, one-third shall belong to my wife, Eliza A. Warren, during her natural life, and also a suitable house for her residence during the same period; and two-thirds of the above named income shall belong to my son, John Henry Warren, for the support of himself and family during his natural life. At the decease of my wife, Eliza A. Warren, the one-third of income belonging to her as dowry shall revert to my estate for the benefit of my lawful heirs. Subject to the direction and control of the said John H. Warren, the trustee of my estate, and after the decease of both my wife, Eliza A. Warren, and of my son, John H. Warren, then my entire estate shall belong in equal values to the children of John H. Warren who shall survive him; said sum to be held in trust for each one until he or she shall be twenty-one years of age. My executors, after consulting with the probate judge, and both judge and executor shall decide that a sale or exchange of any of my real estate in the city of Rockford will benefit my heirs interested in said estate, such sale or exchange and reinvestment may be made with the approval of the probate court, but not otherwise. And my son, John H. Warren, and my wife, Eliza A. Warren, shall not be required to pay rent for the use of the residence that they shall occupy which shall be

suitable for their respective families, but they are not to occupy the double houses that are arranged for different families at one and the same time as tenants." On November 27, 1888, appellant executed under her hand and seal an instrument by which, in consideration of the payment and approval of the award allowed her on that day, and for other good and valuable considerations, she agreed with those interested in the estate as follows: "First. I, widow of said deceased, do hereby covenant and agree to accept the legacy and interest given in and by the last will of said deceased, my award, and the claim of \$200 filed by me in said estate, in full of all claim to or right or interest in the estate, real, personal, or mixed, of said deceased, of every name and nature; and any other interest is hereby expressly waived and released to said estate." The appellant did not renounce the provisions of the will within one year after letters testamentary were issued. During December, 1888, and in each month in the years 1889, 1890, 1891, and 1892, she has received moneys from the trustee and executor out of the income of the estate. She was paid her widow's award, about \$1,200, and the claim of \$200 against the estate, which is above referred to.

The first question arising upon the assignments of error is whether or not the appellant is entitled to have dower assigned to her in the lands of her deceased husband. Sections 10 and 11 of the present dower act, which was approved March 4, 1874, and went into force on July 1, 1874, are as follows: (10) "Any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts." (11) "Any one entitled to an election under either of the two preceding sections shall be deemed to have elected to take such jointure, devise or other provision, unless, within one year after letters testamentary or of administration are issued, he or she shall deliver or transmit to the county court of the proper county a written renunciation of such jointure, devise or other provision." Section 13 prescribes the form of renunciation, by the terms of which the surviving husband or wife does thereby "renounce and quitclaim all claim to the benefit of any . . . devise or other provision made to me by the last will and testament of the said . . . and I do elect to take in lieu thereof my dower and legal share in the estate of the said . . .". As the appellant did not renounce the provisions of the will within one year after letters testamentary were issued to the executor of Alpha Warren's estate, it would seem to be clear that she had elected to take under the will, and that she is not entitled to an assignment of dower in the testator's lands under the decisions of this court. *Cowdrey v.*

Hitchcock, 103 Ill. 262; Stunz v. Stunz, 131 Ill. 210, 23 N. E. R. 407; Cribben v. Cribben, 136 Ill. 609, 27 N. E. R. 70.

It is contended by counsel for appellant that the acceptance by the widow of the provision made for her in the will will not bar her dower, unless such provisions shall be a reasonably adequate compensation for the loss of what she would have been entitled to under the statute if there had been no will. This contention is based upon the decision of the circuit court of the United States for the seventh circuit in the case of *United States v. Duncan*, 4 McLean, 99, Fed. Cas. No. 15,002, where a liberal construction was given to sections 39 and 40 of the act of this state in regard to wills in force in 1829 (Rev. Laws, 1833, p. 624). But a comparison of sections 39 and 40 of the act of 1829 with sections 10 and 11 of the act of 1874 will show that the phraseology of the former is different from the phraseology of the latter. By the terms of said section 11, if the surviving husband or wife fails to renounce within the year, he or she shall be deemed to have elected to take the provision given by the will. The directions of the statute are explicit, and a compliance with them can work no harm to any of the parties concerned. Section 10 directs that the devise or other provision made by the will shall be a bar to dower "unless otherwise expressed in the will." If, therefore, a husband desires to make, in his will, a provision for his wife, which shall not operate as a bar to her dower, he can therein state that such provision is not to be in lieu of dower, in which case she will take both her dower and what is devised or bequeathed to her. If the widow deems such devise or bequest an inadequate compensation for dower, she can file her renunciation within the time specified, and thereby take what she is entitled to under the statute.

In the present case, however, we are not satisfied that the provision made for the appellant by the will is not a reasonably adequate compensation for her dower, if the doctrine of the *Duncan Case* should be held to be applicable. It is conceded that the personal estate of the deceased testator has been exhausted in the payment of the debts and expenses of administration, and that no personal property would have passed to appellant if her husband had died intestate. All that she could have received in any event was dower in the lands. All that her dower, when assigned and set off, would amount to, would be the right to use the one-third in value of her husband's lands, and draw the rents and profits thereof, during her life. The will, by directing that one-third of the annual rents and interest, after deducting certain expenditures, shall belong to her, gives her what is substantially equivalent to the value of her dower in the real estate. Counsel refer us to a number of cases which hold that the wife cannot be deprived of her dower by a testamentary disposition in her favor, so as to put her to her election, unless the testator has declared the same to be in lieu of dower, either in express words or by necessary implication. Under the rule laid down

in most of these cases the testator will not be presumed to have intended the provision in his will to be a substitute for dower, unless the claim of dower would be inconsistent with the will or so repugnant to its provisions as to disturb and defeat them. *Adsit v. Adsit*, 2 Johns. Ch. 448; *Smith v. Keniskern*, 4 Johns. Ch. 9; *Wood v. Wood*, 5 Paige, 595; *Fuller v. Yates*, 8 Paige, 325; *Church v. Bull*, 2 Denio, 430. The decisions referred to will be found, upon examination, to have been rendered in the absence of such statutory provisions as exist in this state, and such decisions are consequently inapplicable to the case at bar. The great object in construing the wills which the courts there had under consideration was to ascertain the intention of the testator upon the question whether or not the testamentary disposition was to be taken in lieu of dower. Even in the *Duncan Case*, *supra*, the reasoning of the court proceeds largely upon the ground that the testator will not be presumed to have intended his bequest or devise to be a substitute for dower if its amount or value is, to a very considerable extent, less than the amount or value of the dower. But under the peculiar terms of the Illinois statute the provision in the will is declared to be a bar, unless the intention that it shall not be a bar is expressed in the will. The statute makes the silence of the testator the conclusive index to his intention, and it also makes the failure to renounce within a specified time conclusive evidence that the surviving husband or wife has elected to take under the will.

We think, however, that if the rules laid down in the authorities relied upon are applied to the interpretation of the will in this case, there will be disclosed an intention to make the testamentary provisions a substitute for dower and not a gift in addition to it. Alpha Warren drew his own will, and he therein designates the portion of the "annual rents and interest" given to his wife as "one-third of income belonging to her as dower." If the one-third of the income specified in the will was to be her dower or "dowry," he could not have intended that she should have another dower outside of and in addition to that given by the will. Again, after directing that one-third of his net annual income shall belong to his wife, he directs that the other two-thirds thereof shall belong to his son, John H. Warren. If the wife was to have dower besides the third of the income given her by the will, the son could not take the two-thirds of the income therein devised to him. The widow, in such case, would virtually have two-thirds, and only one-third would be left for the son. It follows that the claim of dower on the part of the widow is inconsistent with the provisions made for the son in the will, and so repugnant to them that, if allowed, it would defeat them. A case might arise where the widow, in accepting the testamentary disposition, acted without full knowledge and understanding of her true situation and rights, and of the consequence of her acceptance. 4 Kent, Comm., p. 58. It might then be necessary to

determine whether the lapse of more than a year without renunciation would cut her off from the privilege of making her election. *United States v. Duncan, supra*; *Cowdrey v. Hitchcock, supra*. But here it appears that the widow was correctly advised as to her testamentary rights and her statutory rights and the value of the one as compared with the other.

Counsel further insists that the dower of the appellant is not barred because the devise is not to the wife, but to the executor in trust for her benefit. Under the English statute of uses a jointure was not available to bar the widow's dower, unless the settlement was to the wife herself, and not to any other person in trust for her. *Van Arsdale v. Van Arsdale*, 26 N. J. Law, 404. It has also been held that a devise of lands to trustees for the benefit of the wife does not necessarily indicate intention to defeat dower, as the trustee may take the lands subject to its legal incidents, that of dower included. *Wood v. Wood, supra*; *Church v. Bull, supra*. But the language of our statute is broad enough to include devises to trustees for the benefit of the wife, as well as those directly to the wife herself. It would be a narrow construction that would exclude a devise to a trustee from the meaning of the following words in section 10: "Any other provision made by the will of a deceased husband or wife for a surviving wife or husband." The use of the word "for" forbids a limitation of the meaning to devises made to the wife.

The next question is whether the appellant is entitled to have a homestead assigned to her. The will provides not only that there shall belong to the appellant one-third of the net annual income during her natural life, but "also a suitable house for her residence during the same period," and that she shall not be required to pay rent for the use of such residence. Since her husband's death she has continued to reside in the same house, belonging to her estate, in which she lived with him at the time of his death, and several years prior thereto. Section 11, as above quoted, directs that any one entitled to an election under section 10 "shall be deemed to have elected to take such jointure, devise or other provision, unless" there is a renunciation within the specified year. The provision which such person shall be deemed to have elected to take is the whole of the provision made for him or her in the will, and not a part of such provision. The devise elected to be taken will be the whole of the devise given, and not a part thereof. It follows that when appellant, by her failure to renounce, elected to take one-third of the net annual income for her natural life, she also elected to take therewith a suitable house for her residence during the same period. Hence her continued residence in the house where she and her husband lived when he died will be presumed to be in the exercise of her right thereto as given by the will, and not in the exercise of her statutory right of homestead. *Stunz v. Stunz, supra*. The statute gives

a householder having a family an estate of homestead to the extent in value of \$1,000, and continues such exemption after his death to his surviving wife, so long as she continues to occupy the homestead. Rev. St., c. 52, §§ 1, 2. The will in this case does not limit the value of appellant's residence to \$1,000, or any other amount, but only requires that the house shall be suitable for her residence. The residence provided for by the will is not the same as the homestead given by the statute. The general rule is that a person cannot accept and reject the same instrument. *Birmingham v. Kirwan*, 2 Schoales & L. 449; 2 Story, Eq. Jur., § 1077, note 4. It is a maxim of equity not to permit the same person to hold under and against a will. *Brown v. Pitney*, 39 Ill. 468; *Ditch v. Sennott*, 117 Ill. 362, 7 N. E. R. 636. The appellant cannot accept the will as to dower and reject it as to the provision which it makes for a homestead or residence. Nor does the law contemplate that a householder can have two homesteads. *Tourville v. Pierson*, 39 Ill. 446. Appellant, having elected to take a house for her residence according to the terms of the will, cannot have a homestead set apart to her under the statute. It is true that a homestead under the statute is exempt "from the laws of conveyance, descent, or devise," except as therein provided; but where the testator directs in his will that his wife shall have a suitable house for her residence during her life without payment of rent therefor, and she accepts the provision of the will, she cannot insist upon her statutory right of homestead. *Cowdrey v. Hitchcock*, *supra*.

The next question arises upon a cross-error assigned by appellees, and is whether the appellant is justly chargeable with malfeasance as trustee in discharge of certain special assessments levied upon real property of the estate for paving streets and putting in sewers. The will directs that "the annual taxes and insurance, and also all reasonable repairs and improvements, shall be provided for out of the annual rents and interest," before one-third of the annual income shall belong to the wife. It cannot be said that a direction to pay "annual taxes" is a direction to pay special assessments. A special assessment imposed for a special purpose has none of the distinctive features of the ordinary annual tax, which is imposed for some general or public object. *Illinois Cent. R. Co. v. City of Decatur*, 126 Ill. 92, 18 N. E. R. 315; *Id.*, 147 U. S. 190, 13 Sup. Ct. 293. But we see no reason why the paving of a street in front of a lot, and the putting down of a sewer therein, should not be regarded as "reasonable improvements." The improvement may be local as affecting the locality in which the property is situated, but it is of special benefit to the particular property assessed, because it increases its value; not only the permanent value inuring to the benefit of the reversioner, but also the rental value during the existence of the life estate. The widow must pay the taxes and charges upon the property assigned to her for dower. *Peyton v. Jeffries*, 50 Ill.



143; *Whyte v. Mayor, etc.*, 2 Swan, 364; *Haulenbeck v. Cronkright*, 23 N. J. Eq. 407. In *Whyte v. Mayor, etc.*, *supra*, it was held that, where a lot had been assigned to a widow as part of her dower, the cost of paving the street in front of the lot was a proper charge against her. When dower is assigned the widow becomes seized of a freehold estate for life in the portion allotted to her. She is in by relation from her husband's death and is in of the seisin of her husband. 4 Kent, Comm., §§ 61, 69. Standing in his place, she must be "subjected to the charges, duties and services to which the estate may be liable, in proportion, certainly, to her interest therein." *Peyton v. Jeffries*, *supra*. Here the appellant, being entitled to one-third of the net annual rents and interest during her life, may be regarded as a tenant for life. The tenant for life is bound, out of the rents and profits, to keep down all incidental charges upon the land which accrue during the continuance of his or her estate, as for repairs, taxes, and the like. *Whyte v. Mayor, supra*. A special assessment for paving and sewerage, as well as taxes and repairs, may be included in such incidental charges. If, under the terms of the will of Alpha Warren, the appellant cannot be charged with her proportionate share of the special assessments, then the appellee John H. Warren cannot, by the same construction, be charged with his proportionate share thereof. If such assessments are not to be paid out of the rents and interest, how are they to be paid? It is suggested that application can be made to a court of equity for leave to sell some of the land in order to raise the amount required; but the amount of appellant's income might be diminished by such a sale as much as it would be by paying the assessments out of the rents and interest; and, not only so, but a sale of a portion of the property for such a purpose would defeat the manifest intention of the testator as disclosed by that clause of the will which directs "my trustee to hold and keep my estate intact during his natural life-time." For the reason thus stated, we think that the decree of the circuit court was correct in holding that appellant was not entitled to dower and homestead but was erroneous in holding that appellant was wrongfully charged with one-third of said special assessments, and in ordering that the executor and trustee should pay to the appellant the amount so charged to her. For this error the decree to the extent here indicated is reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed.

## CHAPTER VII.

## ESTATES FOR YEARS.

**Sexton v. Chicago Storage Co. et al.**

Decision by Supreme Court of Illinois, June 15, 1889. Opinion by Schofield, J.

*(Reported in 129 Ill. 318.)*

The evidence sufficiently proves that "the Chicago Storage Company has ceased doing business." This is not contested by counsel for appellees, though they seek to avoid its effect by the circumstance which they claim to be proved, that such failure is solely because of the seizure and appropriation of its property for the payment of rent due from Frank F. Cole alone to appellant. It is therefore manifest that in determining whether the corporation has left debts unpaid, so as to bring the case within section 25, chapter 32, Revised Statutes 1874, as amended by the act of May 22, 1877, in relation to corporations (Laws 1877, p. 66), the first and most important question is whether the storage company is an assignee of the term of Frank F. Cole, or only a sublessee under him; for, if it is an assignee of the term of Frank H. Cole, it stands in his shoes as respects his covenant to pay rent, and its property is liable to be seized and appropriated to the payment of the rent by distress, as was done. If, however, it is but a sublessee under Frank F. Cole, it is liable only on its covenants to him.

The leases to Frank F. Cole are "for and during" the terms named, "and until the 1st day of May, 1888." The lease executed by Frank F. Cole to the Chicago Storage Company is of precisely the same premises included by the leases to him, and it is in the identical language of those leases, "for and during" the term named, "and until the 1st day of May, 1888;" so that the terms all end at the same instant of time. No space of time, however minute, therefore, can by any possibility remain after the term of the storage company has ended before the expiration of the term of Cole, in which he could enter upon or accept a surrender of the premises. The general principle, as held by all the authorities, is that, where the lessee assigns his whole estate, without reserving to himself a reversion therein, a privity of estate is at once created between his assignee and the original lessor, and the latter then has a right of action directly against the assignee on the covenants running with the land, one of which is that to pay rent; but if the lessee sublets the premises, reserving or retaining any reversion, however small, the privity of estate between the sublessee and the original landlord is not established, and the latter has no right of ac-

tion against the former, there being neither privity of contract nor privity of estate between them. The chief difficulty has been in determining what constitutes such reservation of a reversion. The more recent English decisions, and all of the text-books treating of the question which have been accessible to us, hold that, where all of the lessee's estate is transferred, the instrument will operate as an assignment notwithstanding that words of devise instead of assignment are used, and notwithstanding the reservation of a rent to the grantor, and a right of re-entry on the non-payment of rent or the non-performance of the other covenants contained in it. 1 Platt, Leases, 1-9, 102; Woodf. Landl. & Ten. (7th ed.) 211; Wood, Landl. & Ten., p. 131, § 93; Tayl. Landl. & Ten. (8th ed.) 16, note 3; Bac. Abr., tit. "Leases," H. 3; 2 Prest. Conv. 124, 125; Beardman v. Wilson, L. R. 4 C. P. 57; Doe v. Bateman, 2 Barn. & Ald. 168; Wollaston v. Hakewill, 3 Scott, N. R. 616. Undoubtedly many cases may be found wherein the lessee has granted to another party his entire term, retaining no reversionary interest in himself; and it has been held that the relation, as between the parties, was that of landlord and tenant, or, perhaps more correctly, lessee and sublessee, because such was clearly the intention of the parties; but this was the result of contract only, and not conclusive upon the original landlord, since he was not a party to it. The relation of landlord and assignee of a term, however, it has been seen, does not result from contract, but from privity of estate, and therefore, when the original lessee has divested himself of his entire term, and thus ceased to be in privity of estate with the original landlord, the person to whom he has transferred that entire term must necessarily be in privity of estate with his original landlord, and hence liable as assignee of the term. See Wood, Landl. & Ten. 132, and authorities cited in note 1; Van Rensselaer v. Hays, 19 N. Y. 68; Pluck v. Digges, 5 Bligh (N. S.), 31; Thorn v. Woollcombe, 3 Barn. & Adol. 586; Carpenters' Union v. Railway Co., 45 Ind. 281; Smiley v. Van Winkle, 6 Cal. 605; Blumenberg v. Myres, 32 Cal. 93; Schilling v. Holmes, 23 Cal. 230.

Counsel for appellees contend, and the courts below ruled accordingly, that the reservation of a new and different rent, or the reservation to the lessor of the right to declare the lease void for the non-performance of its covenants, and to re-enter for such breach, or at the end of the term, coupled with the covenant of the lessee to surrender at the end of the term or upon forfeiture of the term for breach of covenant, make the letting by the lessee a subletting and not an assignment of the term, notwithstanding the lessee has retained in himself no part of the term; and they rely upon Collins v. Hasbrouck, 56 N. Y. 157; Ganson v. Tift, 71 N. Y. 48; McNeil v. Kendall, 128 Mass. 245; and Dunlap v. Bullard, 131 Mass. 161.—as sustaining this contention. There is general language in Collins v. Hasbrouck quite as broad as claimed, but no question therein presented called for its use, and its

meaning ought to be limited by the facts to which it was applied. There the first original lease was for the term of ten years from the 1st of April, 1864; the second was for the term of nine years from the 1st of April, 1865. Thus both expired April 1, 1874. The sublease was for the term of two years and seven months from the 1st of September, 1867,—that is to say, until the 1st of April, 1870,—with the privilege, however, to the lessee to extend the term four years, or until April 1, 1874, by giving two months' notice, etc. The plaintiff claimed that the leases were forfeited by the subletting, and the court so held. No distinction was taken, in the opinion of the court, between an absolute demise until the end of the term and a mere privilege to have the demise extended four years, which was until the end of the term. We have held that a similar clause in a lease is not a present demise, but a mere covenant, which may be specifically enforced in chancery, or upon which an action at law may be maintained for a breach of covenant. *Hunter v. Silvers*, 15 Ill. 174; *Sutherland v. Goodnow*, 108 Ill. 528. And it would seem quite evident that in no view could the reversion have passed until after the grantee elected to have the term for four years longer; and so, when the lease was executed, there was still a reversionary interest in the sublessor of four years, subject, though it may have been, to be thereafter divested by the election of the sublessee. In *Ganson v. Tift*, the sublease provided that at the expiration of the term, or other sooner determination of the demise, the lessee should surrender the demised premises to the lessors, and the court said: "This constitutes a sublease of the premises, and not an assignment of the term." In *Stewart v. Railroad Co.*, 102 N. Y. 601, 8 N. E. R. 200, there was a demise by the lessee to the Long Island Railroad Company for a term longer than that held by the lessee. There was also a different rent to be paid than that provided to be paid by the original lease, and there was a reservation of the right to re-enter for non-payment of rent, etc. It was held that, as to the original landlord, this amounted to an assignment of the lease, and that its character was not destroyed by the reservation therein of a new rent to the assignor with a power of re-entering for non-payment of rent, or by its assumption of the character of a sublease. The court, after laying down the rule substantially as we have heretofore stated it to be recognized by the text-books and recent English decisions, said: "The effect, therefore, of a demise by a lessee for a period equal to or exceeding his whole term is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor, but at the same time the relation of landlord and tenant is created between the parties to the second demise, if they so intended;" citing *Tayl. Landl. & Ten.* (7th ed.), § 109, note; *Id.*, § 16, note 5; 1 Washb. Real Prop. (4th ed.) 515, note 6; *Adams v. Beach*, 1 Phila. 99, 178; *Carpenters' Union v. Railway Co.*, 45 Ind. 281; *Lee v. Payne*, 4 Mich. 106; *Lloyd v. Cozens*, 2 Ashm. 138;

Wood, Landl. & Ten. (Banks' ed.) 347,— and then adding: "These rules are fully recognized in this state. Prescott v. De Forest, 16 Johns. 159; Bedford v. Terhune, 30 N. Y. 457; Davis v. Morris, 36 N. Y. 569; Woodhull v. Rosenthal, 61 N. Y. 382, 391, 392." In speaking of the ruling in Collins v. Hasbrouck, *supra*, after stating the facts, the court said: "In the opinion the question is discussed whether the sublease amounted to an assignment of the term of the original lease, or a mere subletting or reletting of part of the demised premises. This question, in view of the result reached on the question of waiver, ceased to be controlling, but, in discussing it, the learned judge delivering the opinion made some remarks touching the effect of reserving a new rent in the sublease, and of reserving to the original lessee a right of re-entry for a breach of condition by his lessee, which have given rise to some confusion. The features of the instrument which are above referred to would be proper subjects of consideration for the purpose of determining whether the relation of landlord and tenant was created as between the original lessee and his lessee, and bore upon the question then before the court, viz, whether the second lease was a subletting or reletting of part of the demised premises, which constituted a breach of the covenant not to sublet or relet. But the question of privity of estate between the original lessor and the lessee of his lessee was not in the case. The determination of the question depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right to entry for breach of condition are immaterial." And, after quoting many authorities to sustain that position, the opinion proceeds: "The cases which hold that where a lessee subleases the demised premises for the whole of his term, but his lessee covenants to surrender to him at the end of the term, the sublease does not operate as an assignment, proceed upon the theory that, by reason of this covenant to surrender, some fragment of the term remains in the original lessor. In most of the cases, and in the earlier cases in which this doctrine was broached, the language of the covenant was that the sublessee would surrender the demised premises on the last day of the term."

It is true that in this case, as has been before stated, the lessee demised for a number of years beyond the term for which he held; but it is impossible that, upon principle, there can be any difference between a demise of an entire term, which can leave no possible space of time remaining in the lessor, and a demise for an additional time beyond the term; for, since no one can demise what he does not have, all that can pass by the demise in the latter instance is the entire term of the lessor. If, here, the demise of Frank F. Cole vests his entire interest in the property, as it professes to do, "for and during" the remainder of his term, "and until the 1st day of May, 1888," it cannot be

that any portion, however short in duration, of the term granted him by the leases of appellant, remained in him, because they are limited by the same words precisely, namely, "for and during" the term, "and until the 1st day of May, 1888." In *McNeil v. Kendall*, *supra*, there were easements reserved from the effect of the lease. In *Dunlap v. Bullard*, *supra*, however, the facts are analogous in principle to those here involved; and it was held that the demise of the entire term of the lessee was a sublease and not an assignment, because of the right reserved in the lease for the lessor to re-enter and resume possession for a breach of the covenants. But this is held upon the ground that, under the decisions of that court, the right to re-enter and forfeit the lease is a contingent reversionary estate in the property; the court having previously held, in *Austin v. Parish*, 21 Pick. 215-223, and in *Church v. Grant*, 3 Gray, 142-147, that, where an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest, which is an estate capable of devise. It has been suggested that these decisions are predicated upon a local statute (see Tied. Real Prop., note 1 to sec. 277, and note 1, p. 904, 6 Amer. & Eng. Cyclop. Law), but whether this be true or not, the decisions are plainly contrary to the principles of the common law. The right to enter for breach of condition subsequent could not be alienated as it could have been had it been an estate; and Coke says: "The reason hereof is for avoiding of maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entry or re-entry can be granted over." Co. Litt., § 347 (214a). See also 1 Com. Dig., tit. "Assignment," C. 2, p. 688; 3 Com. Dig., tit. "Condition," O. 1, p. 124; 4 Kent, Comm. (8th ed.) 126, 123; 1 Prest. Est. 20, 21; Shep. Touch. 117, 121. It is said in 1 Washb. Real Prop. (2d ed.) 474, 451: "Such a right [*i. e.*, to enter for breach of condition subsequent] is not a reversion, nor is it an estate in land. It is a mere chose in action, and, when enforced, the grantor is in by the forfeiture of the condition and not by the reverter." To like effect is also Tied. Real Prop., § 277; 6 Amer. & Eng. Cyclop. Law, 903; Tayl. Landl. & Ten. (8th ed.), § 293; *Southard v. Railroad Co.*, 26 N. J. Law, 21; *Webster v. Cooper*, 14 How. 501; *Schulenberg v. Harriman*, 21 Wall. 63; *Nicoll v. Railroad Co.*, 12 N. Y. 121. It is true that by section 14 of our statute in relation to landlord and tenant (Rev. St. 1874, p. 659), "the grantees of any demised lands, tenements, rents or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee shall have the same remedy by entry, action or otherwise for the non-performance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in such lessor or grantor." But this does not make what was before but a chose in action an estate.

The right to enter for breach of covenant is still but a remedy for enforcing performance of a contract which may be defeated by tender. *Tayl. Landl. & Ten.* (8th ed.) 302. As is said by the court in *De Peyster v. Michael*, 6 N. Y. 507, in speaking of the effect of a like statute of New York: "The statute only authorized the transfer of the right, and did not convert it into a reversionary interest nor into any other estate." See also *Nicoll v. Railroad Co.*, 12 N. Y. at p. 139. It follows that, in our opinion, the rule assumed to be followed in *Collins v. Hasbrouck*, *Ganson v. Tift*, and *Dunlap v. Bullard*, *supra*, is not in conformity with the common law, and that it cannot, therefore, be applied here.

The objection that the written assent of appellant was not obtained to the assignment cannot be urged by appellees. The clause in the leases, in that respect, is for the benefit of, and can be set up by, appellant alone. He may waive it if he will; and if he does not choose to set it up no one else can. *Webster v. Nichols*, 104 Ill. 160; *Willoughby v. Lawrence*, 116 Ill. 11, 4 N. E. R. 356; *Arnsby v. Woodward*, 6 Barn. & C. 519; *Rede v. Farr*, 6 Maule & S. 121.

But counsel insist that appellant is estopped by his conduct to now allege that the instrument executed by Frank F. Cole is an assignment. We have carefully considered the evidence bearing upon this question and we are unable to concur in this view. Appellant did refuse to acquiesce in the construction placed by appellees upon the lease of Frank F. Cole, and to settle with them upon that basis. He refused to release Frank F. Cole and accept the storage company alone; and he refused to accept the amount of rent which the storage company obligated itself to pay Frank F. Cole as a satisfaction of Frank F. Cole's covenant to pay rent to him; but he was all the time willing that the storage company should remain in possession, provided the rent due him by his lease to Frank F. Cole was paid to him. He knew the terms of the lease of Frank F. Cole to the storage company, and he afterwards received rent from it and permitted it to remain in possession. The lessee continues, notwithstanding the assignment, liable upon his express covenant to pay rent; and the assignee becomes liable upon the same covenant, by reason of his privity of estate, because that covenant runs with the land. *Tayl. Landl. & Ten.* (8th ed.), § 438; 2 *Platt, Leases*, 356; *Walton v. Cronly*, 14 Wend. 63; *Bailey v. Wells*, 8 Wis. 141. Since appellant might sue Cole on his express covenant to pay rent, and, he having fled the state, take out an attachment in aid thereof, we perceive no reason why he might not at the same time take garnishee process against the storage company, and recover any debt which it owed him. There is certainly nothing in this inconsistent with his ultimately enforcing his liability against that company as assignee of Cole's term. It is not shown that the storage company has been, by anything done or said by appellant, induced to do to its prejudice anything that it would not otherwise have done. No judgment has

been recovered against it, as garnishee of Frank F. Cole, for rent due from it to Frank F. Cole, nor does it appear, otherwise, to have been compelled to pay money or incur liability by reason of any act or word of appellant proceeding upon the recognition of its being liable to Frank F. Cole, as such lessee, only. For the reasons given, the decree of the superior court, and the judgment of the appellate court, are reversed, and the cause is remanded to the superior court for further proceedings consistent with this opinion.

### **Newman v. Rutter.**

Decision by Supreme Court of Pennsylvania, May, 1839. Opinion by Rogers, J.

*(Reported in 8 Watts, 51.)*

One of the objections to the judgment of the court of common pleas is their answer to the fourth point. The court instructed the jury, in answer to that point, that to entitle the plaintiff to enter agreeably to the terms of the deed, it must appear not only that the rent was in arrear and unpaid, but that there was not sufficient personal property on the lot, liable to be distrained, to enable plaintiff effectually to compel payment of the rent by distress. By the terms of the deed it is stipulated that if the rent should be in arrear sixty days, the grantor might distrain; and if a sufficient distress should not be on the premises, that the owner of the rent might enter on the lots and repossess them, as though the deed had not been made. The deed must be construed according to the intention of the parties; and, to entitle the plaintiff to enter, it must appear not only that the rent was in arrear for the time specified, but that upon a distress being made by him, it was found that there was not sufficient property on the premises to pay it. In this point of view, therefore, the defendant, rather than the plaintiff, has reason to complain of the charge, as the court put the case upon the fact whether there was enough of property on the premises to answer the plaintiff's claim. If the plaintiff had pursued his remedy by distress, there were, if the witnesses are to be believed, at all times, goods more than sufficient for that purpose.

But the plaintiff contends that the defendant denied his title, and that this denial amounts to a forfeiture, and that, therefore, he can maintain ejectment. A forfeiture may be incurred either by a breach of those conditions which are always implied and understood to be annexed to the estate, or those which may be agreed upon between the parties, and expressed in the lease. The lessor, having the *jus disponendi*, may annex whatever conditions he pleases, provided they be not illegal, unreasonable or repugnant to the grant itself; and upon breach of these conditions may avoid the lease. Any act of the lessee,



by which he disaffirms or impugns the title of his lessor, comes within the first class; for, to every lease the law tacitly annexes a condition that if the lessee do anything which may affect the interest of the lessor, the lease shall be void, and the lessor may re-enter. Every such act necessarily determines the relation of landlord and tenant; since to claim under another, and at the same time to controvert his title; to affect to hold under a lease, and at the same time to destroy the interest out of which the lease arises, would be the most palpable inconsistency. Barr. Leases, 119; Woodf. Landl. & Ten. 219. So where the tenant does an act which amounts to a disavowal of the title of the lessor, no notice to quit is necessary; as where the tenant has attorned to some other person, or answered an application for rent by saying that his connection as tenant with the party applying has ceased. Bull. N. P. 96; Esp. N. P. 463. In such cases, as the tenant sets his landlord at defiance, the landlord may consider him either as his tenant, or as a trespasser. But these principles only apply where there is no dispute as to the person entitled to the rent; so where there was a refusal to pay rent to devisee in a will which was contested, it is not such a disavowal of the title as will enable the devisee to treat the tenant as a trespasser, and to maintain ejectment without previous notice. Woodf. Landl. & Ten. 219, and the authorities there cited. These principles are usually applied to the relation which subsists between landlord and tenant on a demise for a term of years; and whether they are applicable to a grant of land in fee with the reservation of a rent charged on the land may admit of doubt, although no case has been cited, and I know of none, where it has been so applied. But however this may be, the doctrine does not hold where there is no denial of the title under which the defendant claims, but it is denied that the plaintiff is the person entitled to receive the rent, although he is the representative or devisee of the original grantor, or where, as in this case, the proportion of the rent which he owns is disputed. The plaintiff claims the entire rent, and the court and jury have decided that he is entitled to a moiety only. It would therefore be a harsh application of the principle to decide that a defense which certainly has some plausibility about it should work a forfeiture of the estate. Courts of law always lean against a forfeiture, and it is the province of a court of equity to relieve against it. Whenever a landlord means to take advantage of a breach of covenant, so as that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the tenancy, and so operate as a waiver of the forfeiture, as distraining for the rent, or bringing an action for the payment of it, after the forfeiture has accrued, or accepting rent. Bull. N. P. 96; Woodf. Landl. & Ten. 227; Barr. Leases, 226. For this reason the court was right in admitting in evidence a receipt from the plaintiff to the defendant for ground rent for the two lots for the year 1831; this evi-

dence was pertinent because the receipt of rent waives the forfeiture, if any such there was, for neglecting to erect the buildings on the lot, as provided for in the deed.

In deducing title to the ground rents, plaintiff proved that the ground rent in Newmanstown had been devised by the last will and testament of Walter Newman to Henry Newman and David Newman, as joint devisees. This, of course, vested in Henry Newman, the plaintiff, a moiety only of the ground rent reserved in the deeds. For the purpose of proving that he was entitled to the whole ground rent charged on the *locus in quo*, he offered in evidence a deed from Magdalena Newman, administratrix of David Newman, deceased, one of the devisees of Walter Newman, to Christian Seibert, dated the 24th of August, 1786, for sixty-three acres of the tract of one hundred and twenty-eight acres devised to Henry and David Newman, by Walter Newman, the said sixty-three acres including the one-half of Newmanstown; also a deed from Christian Seibert to Francis Seibert, for same, dated the 19th of April, 1793; also the will of Francis Seibert, devising the same sixty-three acres, including one-half of Newmanstown, to Elizabeth, wife of Peter Shoch, dated February 9, 1811, with parol proof that the said Francis Seibert, in the year 1805, or thereabouts, until the time of his death, and those claiming under him since his death, held and exercised exclusive ownership and occupation of the said sixty-three acres, including the one-half of Newmanstown, and that Henry Newman, the other devisee of Walter Newman, and those claiming under him, in the same time, viz.: from the year 1805, or thereabouts, to the present time, have exercised exclusive ownership on the remainder of the tract of one hundred and twenty-eight acres, including the other half of Newmanstown, and that the two lots for which this ejectment is brought are located in that part of the said tract last mentioned; with further parol proof that search has been made in the recorder's office in Dauphin and Lebanon counties for deed or agreement of partition of the premises, and none such has been found.

From the evidence here offered it is plain that the ground rent was not divided between the devisees by writ of partition; so that the only question is, was such proof offered as will justify the jury in presuming a deed, grant, or mutual conveyance? The evidence would have proved that the plaintiff had been in the enjoyment and receipt of the entire rent, charged on the premises, for a period of thirty years and upwards, and that they who deduce their title from David Newman had received the whole ground rent charged on this portion of the estate. A jury is required, or at least may be advised by a court, to infer a grant of an incorporeal hereditament after an adverse enjoyment for the space of twenty-one years; and in *Hearn v. Lessee of Witman*, 6 Bin. 416, it is held that what circumstances will justify the presumption of a deed is matter of law; and that it is the duty of the court to

give an opinion whether the facts proved will justify the presumption. This presumption seems to have been adopted in analogy to the act of limitations, which makes an adverse enjoyment of twenty-one years a bar to an action of ejectment; for as an adverse possession of that duration will give a possessory title to the land itself, it seems, also, to be reasonable that it should afford a presumption of right to a minor interest arising out of the land. The ground of presumption, in such cases, is the difficulty of accounting for the possession or enjoyment without presuming a grant or other lawful conveyance. This is not an absolute presumption, but one that may be rebutted by accounting for the possession consistently with the title existing in another. Here we cannot account for the enjoyment and receipt of the entire rent without presuming a grant or some lawful conveyance from the one tenant in common to the other; and for this reason we think the court erred in excluding the evidence.

The court were right in admitting the evidence of Job Pearson. The objection goes to his credit rather than to his competency.

Judgment reversed and a *venire de novo* awarded.

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## CHAPTER VIII.

### TENANCY FROM YEAR TO YEAR, ETC.

#### Weed v. Lindsay et al.

Decision by Supreme Court of Georgia, January 11, 1892. Opinion by Bleckley, C. J.

(*Reported in 88 Ga. 686.*)

The contract of June 4, 1889, signed by the parties, respectively, a copy of which is in the report, was not a present demise or lease which granted to Lindsay & Morgan an immediate estate for years, but was an agreement to give them a future lease for ten years from the time the building to be erected was "ready for occupation." It is plain from the nature of the agreement and the language of the instrument that the contract was executory on both sides. It was not contemplated that Lindsay & Morgan should become tenants to Weed, or owners of any interest in the premises, or that they should be liable for the payment of the stipulated rent, if Weed did not erect the building and make it ready for occupation. Until that time should arrive they were to remain without any interest in the property whatever. If the building, as they contend, has not yet been completed and made ready for occupation according to the agreement, the time appointed

for an interest to vest in them as lessees, and for their occupation to commence, has not yet arrived; and so they are without any legal ownership of an estate for years, or of a right to possession by virtue of such ownership. The instrument executed as evidence of the contract contains no words of present demise or any equivalent terms, nor does it fix with certainty either the amount of the annual rent to be paid, or appoint any time for the completion of the building and the consequent commencement of the ten years' term. The amount of the rent was to, or might, depend in part upon the cost of the building, and when the building would be ready for occupation would necessarily depend on contingencies to be met and dealt with after the agreement was signed. It is manifest that the words, "Upon these conditions, Joseph D. Weed agrees to give them a lease for ten years from the date the building is ready for occupation," ought to be construed, not as a stipulation for further assurance, but as an undertaking to create a lease not previously existing, and to pass by it an estate not before conveyed nor attempted to be conveyed. It could not have been the intention of the parties either that Lindsay & Morgan should be owners of the contemplated terms of years, or any term in the premises, before the annual rent which they were to pay began to accrue, or that this rent was to begin to accrue before the building was ready for occupation. In distinguishing between a lease and a mere executory agreement for a lease, the intention of the parties, as manifested by the writing, is a controlling element. Lloyd, Bldg. Cont., § 88; 12 Am. & Eng. Enc. Law, 980; 1 Wood, Landl. & Ten., § 179; McAdam, Landl. & Ten., § 41; 1 Tayl. Landl. & Ten., § 37 *et seq.*; 6 Lawson, Rights, Rem. & Prac., § 2801. For cases illustrating the distinction, see *Sturghion v. Painter*, Noy, 128; *Jackson v. Ashburner*, 5 Term R. 163; *Hegan v. Johnson*, 2 Taunt. 148; *Jackson v. Bulkley*, 2 Wend. 433; *People v. Kelsey*, 38 Barb. 269, 14 Abb. Prac. 372; *McGrath v. City of Boston*, 103 Mass. 369; *Adams v. Hagger*, 4 Q. B. Div. 480; *Jackson v. Kisselbrack*, 10 Johns. 336; *Kabley v. Gaslight Co.*, 103 Mass. 392.

No lease creating a term of ten years, and vesting the same in Lindsay & Morgan, having ever come into existence as contemplated by the agreement, what was the effect of admitting them into possession by virtue of the consent given by Weed in his letter to them of September 27, 1889, in which he says: "I simply write to tell you, as Mr. Brown told me you wished to begin to occupy the building before it was entirely finished, that the rent will begin from the time you begin to occupy it. I have no objection whatever to your moving into the building as soon as you find it can serve your convenience to do so," (Mr. Brown was the contractor employed by Weed to construct the building.) Was this permission a license to occupy for ten years without the execution of any lease, or was it, as events turned out (possession having been taken under it, and Lindsay & Morgan having after-

wards refused to join in the execution of a lease), the creation of a tenancy at will? We think it was the latter, and, no rent having at any time been paid and accepted, this is in accordance with the current of authority. 1 Tayl. Landl. & Ten., § 60; 1 Washb. Real Prop., p. 376; Tied. Real Prop., § 216; 6 Lawson, Right, Rem. & Prac., § 2809; 12 Am. & Eng. Enc. Law, 670; Chapman v. Towner, 6 Mees. & W. 100; Anderson v. Railway Co., 3 El. & El. 614; Anderson v. Prindle, 23 Wend. 616; Dunne v. Trustees, 39 Ill. 578. In Hamerton v. Stead, 3 Barn. & C. 483, Littledale, J., said: "Where parties enter under a mere agreement for a future lease, they are tenants at will; and, if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract." Perhaps, as the law of remedy in the superior court now stands, the payment of rent would have raised, not merely a tenancy from year to year, but one for the whole term covered by the lease. Walsh v. Lonsdale, 21 Ch. Div. 9. It is plain that, consistently with the written agreement of the parties, Lindsay & Morgan would have no right to occupy and use the premises for ten years unless they were willing to pay therefor the stipulated rent, nor unless they were willing to occupy as lessees, and not merely as tenants at will. In this litigation they seek, as they did in some of the preliminary steps which led to it, to take the position and have all the rights of lessees on terms different from any which Weed has ever assented to; that is, they want to hold at a less annual rent than they have agreed to pay. They make this claim because, as they contend, Weed has not erected and made ready for occupation such a building with respect to plan and finish as was contemplated. If this contention be well founded in fact, the result will be, not that they could occupy for ten years on terms different from those agreed upon, but that they could, if they did not choose to waive their objection and unite in the lease and pay the stipulated rent, exercise their option between vacating the premises, and compelling, by a proper equitable action, a specific performance on the part of Weed of his undertaking. Weed's violation of his contract would also furnish a cause of action in their favor for any damages resulting from his failure to comply. Perhaps if they had, under protest, paid rent according to the contract, they might have done so without surrendering any substantial right, legal or equitable. Lamare v. Dixon, L. R. 6 H. L. 514. When this proceeding was commenced, they had not pursued any course open to them, but had endeavored to pursue one not open; they had declined to join in the lease; had not paid rent at the stipulated rate; had entered no suit for specific performance; and had refused to vacate the premises. Having brought themselves into the position of mere tenants at will, section 2291 of the code applies to them. The two-months notice having been given, they were subject to eviction as tenants holding over. Code, §§ 4077-4081.

The pleadings in the case were simply the affidavit and counter-affidavit provided for by the sections of the code last cited. The pending application in the superior court to enjoin the prosecution of this proceeding was not operative, because no injunction, temporary or permanent, had been ordered, nor any restraining order granted. What we have ruled embraces all that is fundamental in the case, and effectually controls the final result of this proceeding in the city court. The court erred in not granting a new trial.

Judgment reversed.

### **Russell v. Fabyan.**

Decision by Supreme Court of New Hampshire, July Term, 1856. Opinion by Bell, J.

*(Reported in 34 N. H. 218.)*

Fabyan entered into possession of the premises in question under a written lease, to continue for five years from March 20, 1847. He remained in possession until April 29, 1853, when the buildings were burned down, more than a year after the lease expired. During the interval between the 20th of March, 1852, and April 29, 1853, he was either a tenant at sufferance, a tenant at will, or a disseizor. The general principle is that a tenant who, without any agreement, holds over after his term has expired, is a tenant at sufferance. 2 Bl. Comm. 150; 4 Kent, Comm. 116; *Livingston v. Tanner*, 12 Barb. 483. No act of the tenant alone can change this relation; but if the lessor or owner of the estate, by the acceptance of rent, or by any other act, indicates his assent to the continuance of the tenancy, the tenant becomes a tenant at will, upon the same terms, so far as they are applicable, of his previous lease. *Conway v. Starkweather*, 1 Denio, 113.

In this case there is no evidence to justify an inference of assent by the lessor to any continuance of the tenancy, but, on the contrary, very direct and conclusive evidence, in the demand of possession, to the contrary; while the reply made to that demand by Fabyan negatives any consent on his part to remain tenant of the plaintiff. There was, then, no tenancy in fact between these parties at the time of the fire, and the defendant was consequently either a disseizor or a tenant at sufferance.

When the demand of possession was made upon Fabyan, upon the 22d of March, 1853, the demand was refused, Fabyan saying he had taken a lease of the property from Dyer. The previous demands seem to have been premature, and before the expiration of the lease, but they were refused upon the same ground as the last, and that refusal might constitute a waiver of any objection to the time of their being made.

Such a denial of the right of the lessor, though not a forfeiture of a lease for years, is sufficient to put an end to a tenancy at will, or at suf-

ferance, if the lessor elects so to regard it; and he may, if he so choose, bring his action against the tenant as a disseizor, without entry or notice, and may maintain against him any action of tort, as if he had originally entered by wrong. *Delaney v. Ga Nun*, 12 Barb. 120.

But as this result depends on the lessor's election, and nothing appears in the present case to indicate such election, the tenant must be regarded as a tenant at sufferance.

To ascertain the liability of a tenant at sufferance for the loss of buildings by fire, it becomes material to inquire what is the nature of this kind of tenancy; and we have examined the books accessible to us, to trace the particulars in which it differs from the case of a party who originally enters by wrong.

All the books agree that he retains the possession as a wrong-doer, just as a disseizor acquires and retains his possession by wrong. *Den v. Adams*, 12 N. J. Law, 99; 2 Bl. Comm. 150; 4 Kent, Comm. 116. By the assent of the parties to the continuance of the possession thus wrongfully obtained or retained, the wrong is purged, and the occupant becomes a tenant at will or otherwise to the owner. 10 Vin. Abr. 416, "Estate," D, C, 2.

If no such assent appears, the tenant is entitled to no notice to quit. *Jackson v. McLeon*, 12 Barb. 483; 12 Johns. 182; 1 Cruise, Dig., tit. 9, § 10.

The owner may make his entry at once upon the premises, or he may commence an action of ejectment or real action. *Livingston v. Tanner*, 12 Barb. 483; *Den v. Adams*, 12 N. J. Law, 99. And it makes no difference that the lessee, after his term has expired, has taken a new lease for years of a stranger rendering rent, which has been paid; for he still remains tenant at sufferance as to the first lessor, as was held in *Preston v. Love*, Noy, 120; 10 Vin. Abr. 416.

We have been able to discover but one point of difference between the case of the disseizor and the tenant at sufferance, which is that the owner cannot maintain an action of trespass against his tenant by sufferance until he has entered upon the premises (4 Kent, Comm. 116); a point to which we shall have occasion further to advert.

Upon this view the liability of the defendant Fabyan to answer for the loss by fire, which is the subject of this suit, is regulated, not by the rule applicable to tenants under contract, or holding by right, but by that which governs the case of the disseizor and unqualified wrong-doer.

By statute (6 Anne, c. 31, made perpetual 10 Anne, c. 14; 1708, 1712) no action or process whatever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall accidentally begin. Co. Litt. 67, note 377; 3 Bl. Comm. 228, note; 1 Com. Dig. 209, "Action for Negligence," A, 6. It is not necessary to consider whether this statute has been adopted here, though it is strongly recommended by its intrinsic equity, because at all events a different rule applies in this case.

The mere disseizor or trespasser, who enters without right upon the land of another, is responsible for any damage which results from any of his wrongful acts. Such a disseizor is liable for any damages occasioned by him, whether willful or negligent. He had no right to build any fire upon the premises, and if misfortune resulted from it he must bear the loss.

For this purpose the defendant Fabyan stands in the position of a disseizor.

2. Assuming that Fabyan is liable for the loss of these buildings the question arises whether he is liable in this form of action; and, as we have remarked, he is not liable in trespass. Chancellor Kent (4 Comm. 116) says: "A tenant at sufferance is one that comes into possession of land by unlawful title, but holdeth over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer, or transmit, or which is capable of enlargement by lease, for he stands in no privity to his landlord, nor is he entitled to notice to quit; and, independent of the statute, he is not liable to pay any rent. He holds by the laches of the landlord, who may enter and put an end to the tenancy when he pleases. But before entry he cannot maintain an action of trespass against the tenant by sufferance." 1 Cruise, Dig., tit. 9, c. 2; *Rising v. Stanard*, 17 Mass. 282; *Keay v. Goodwin*, 16 Mass. 1, 4; 2 Bl. Comm. 150; Co. Litt. 57*b*; *Livingston v. Tanner*, 12 Barb. 483; *Trevillian v. Andrew*, 5 Mod. 384.

If, then, Fabyan is answerable at all, he must be liable to the action of trespass on the case. There is no evidence of any entry, and the demand of possession, whatever its other effects may be, is not an entry, nor do we find it made equivalent to an entry.

The case of *West v. Trende*, Cro. Car. 197, Jones, 124, 224, is a decision that case lies in such a case.

"Action upon the case. Whereas he was and yet is possessed of a lease for divers years *adtunc et adhuc ventur*, of a house, and being so possessed demised it to the defendant for six months, and after the six months expired, the defendant being permitted by the plaintiff to occupy the said house for two months longer, he, the defendant, during that time pulled down the windows, etc. Stone moved, in arrest of judgment, that this action lies not, for it was the plaintiff's folly to permit the defendant to continue in possession, and to be a tenant at sufferance, and not to take course for his security; and if he should have an action it should be an action of trespass, as Littleton (section 71). If tenant at will hath destroyed the house demised, or shop demised, an action of trespass lies, and not an action upon the case. But all the court conceived that an action of trespass or an action upon the case may well be brought, at the plaintiff's election, and properly in this case it ought to be an action upon the case, to recover as much as he may be damnified, because he is subject to an action of waste; and



therefore it is reason that he should have his remedy by action upon the case. Whereupon rule was given that judgment should be entered for the plaintiff."

3. It seems clear that if Fabyan is to be regarded as a wrong-doer in retaining the possession of the plaintiff's property after his lease had expired, all who aided, assisted, encouraged or employed him to retain this possession must be regarded as equally tort-feasors, and equally responsible for any damage resulting from his wrongful acts. No more direct act could be done to encourage a tenant in keeping possession than that of leasing to him the property, unless it was that of giving him a bond of indemnity, such as is stated in this case. In wrongs of this class all are principals, and the defendant, Dyer, must be held equally responsible with Fabyan; and it seems clear that as Dyer could justify in an action of trespass under the authority of Fabyan so as, like him, not to be liable in that action, he must be liable with him in an action upon the case.

Whether the allegations of the declarations are suitable to charge either of the defendants, we have not considered, as the court have not been furnished with a copy.

4. The case of *Russell v. Fabyan*, 7 Fost. (N. H.) 529, is not to be regarded as a decision of the question raised in this case, in relation to the sale of a supposed right of redemption as belonging to Burnham, after the first levy made upon the property. It was there held, upon the facts appearing in that case, that independent of the question of fraud in Burnham's deed to Russell, all Burnham's right of redeeming the levy, which might be made upon the attachment subsisting at the time of the deed, and of course good against it, passed to Russell. Upon this point there can be no question, and none is suggested. The question then arose, whether, if Russell's deed was proved to be fraudulent as to the creditors of Burnham, the right of redemption did not pass to Dyer by the sale on his second execution, so as to invalidate the tender made by Russell. This question might have been met and decided, but the case did not require it. It was held that whether Russell's title was good or bad, Fabyan, as his tenant, could not dispute it. He could be discharged from his liability to pay his rent, which was the subject of that action, only by an eviction by the lessor, or by some one who had a paramount title to his; a mere outstanding title not put in exercise is not a defense. The defendant relied on an eviction on the 14th of June, 1848, as his defense. The sale of the right of redemption was made on the 31st of July following, and after that date there was no eviction, so that the attempt there was merely to show an outstanding but dormant title, which it proved would be no defense. And the court took the ground that Fabyan stood in no position to raise a question as to the validity of Russell's title, except so far as the opposing title was the occasion of some disturbance of his estate. So far as the principles

stated in that case are concerned, they appear to us sound and unanswerable. Whether, if the case had taken a different form, the result would have been in any degree different, it is not necessary to inquire.

By our statute every debtor whose land or any interest in land is sold or set off on execution has a right to redeem by paying the appraised value, or sale price, with interest, within one year. Rev. St., ch. 195, sec. 13; Id., ch. 196, sec. 5; Comp. St., pp. 501, 502. This right to redeem is also subject to be levied upon and sold, as often as a creditor supposes he can realize any part of his debt by a sale, until some one of the levies or sales becomes absolute. But these sales have each inseparably connected with them the right of redemption. If the debtor has parted with his title before the levies are made while the property is under an attachment, the right of redemption is vested in his grantee, who, being the party interested, may redeem any sale or levy if he pleases; the effect of his payment or tender for this purpose being of course dependent upon the state of facts existing at the time. . . . Russell had a right, as a party interested in the land, to pay or tender the amount of the first levy to Dyer and so to discharge it. . . . And if it should be shown that the deed to Russell was void as to creditors, and Dyer was one of that class, his second levy was good if properly made, and title to these premises passed to him, subject to his prior and any subsequent levy, and to Russell's right of redemption. As the offer of the defendant to prove Burnham's deed to Russell to be fraudulent and void as to creditors, and as to the defendant, Dyer, as one of them, was refused, there must be a new trial.

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## CHAPTER IX.

### JOINT ESTATES.

#### **Mette et al. v. Feltgen.**

Decision by the Supreme Court of Illinois, January 16, 1894. Opinion by Bailey, J.

*(Reported in 148 Ill. 357.)*

This was an action of ejectment brought by Anna M. Feltgen against Henry, August and Louis Mette to recover the undivided one-half of lots eight and nine in block five in Murray's addition to South Chicago. The defendants pleaded not guilty, and the cause being tried by the court, a jury being waived, it was found that the plaintiff was the owner in fee of an undivided one-half of the lots, and that the defendants were guilty of unlawfully withholding possession thereof from her.

A motion by the defendants for a new trial being overruled, judgment was entered that the plaintiff recovered possession of the undivided one-half of the lots, and that a writ of possession issue in her favor therefor. The defendants bring the record to this court by appeal.

The facts are all admitted by stipulation and are, in substance, as follows: On the 23d day of April, 1878, Theodore H. Schintz, the common source of title of the plaintiff and defendants, executed and delivered to Peter Mayer and Anna Mayer, his wife, a deed which, omitting the signature and certificate of acknowledgment, is as follows: "This indenture witnesseth that the grantor, Theodore H. Schintz, a bachelor, of the city of Chicago, in the county of Cook and state of Illinois, for the consideration of \$1, conveys and quitclaims to Peter Mayer and Anna Mayer, his wife, not as tenants in common, but as joint tenants of the city of Chicago, county of Cook and state of Illinois, all interest in the following described real estate, to wit, lots eight and nine in block five in Murray's addition to South Chicago, situated in the county of Cook and state of Illinois, hereby releasing and waiving all right under and by virtue of the homestead and exemption laws of this state. Dated this 23d day of April, 1878." Anna Mayer, one of the grantees in the deed, died intestate April 4, 1879, leaving, surviving her, her husband and co-grantee, and also leaving the plaintiff, her daughter by a former marriage and her only heir at law, who was then a minor between eleven and twelve years of age. On the 16th day of February, 1882, Peter Mayer executed a deed conveying the lots to August Mette and Henry Mette, and on the same day the plaintiff, then being a minor between fourteen and fifteen years of age, executed a deed by which, for an expressed consideration of \$50, she conveyed and quitclaimed to August and Henry Mette all her interest in the lots. On the 11th day of September, 1885, the plaintiff attained the age of eighteen years, and on the 15th day of June, 1888, she executed, acknowledged and recorded an instrument expressly revoking, annulling and declaring void her deed executed during her infancy; and July 13, 1888, as a further act of disaffirmance, she instituted this suit, and shortly thereafter commenced a suit in chancery to set the deed aside and to recover her interest in the lots. August and Henry Mette, immediately after the execution of the deeds to them, together with their co-defendant, Louis Mette, took possession of the lots, and excluded the plaintiff therefrom, and were in possession thereof, to the exclusion of the plaintiff, at the time of the commencement of this suit, and are still in possession. On the 12th day of January, 1884, August and Henry Mette executed to Louis Mette a deed by which they conveyed to him a fractional interest in the lots.

The conveyance by the plaintiff to August and Henry Mette, made during her minority, having been expressly revoked and disaffirmed by her after becoming of age, may be disregarded, and the rights of the

parties are to be determined precisely as though no such conveyance had been made. The claim of the defendants is that the estate of Peter Mayer and Anna Mayer, his wife, in the lots, was a joint tenancy, with the common-law incident of survivorship, and consequently that, upon the death of Anna Mayer, Peter Mayer, by right of survivorship, became tenant of the lots in severalty, to the exclusion of the heir at law of Anna Mayer, and that Peter Mayer's conveyance of the lots to August and Henry Mette vested in them the entire estate. The plaintiff, on the other hand, insists that, whether the deed from Schintz to Peter Mayer and wife created a joint tenancy or not, it was, under our statute, a tenancy in respect to which there was no right of survivorship, and therefore that on the death of Anna Mayer her joint interest descended to and became vested in the plaintiff, as her sole heir at law. There can be no doubt that the parties in the Schintz deed intended thereby to create an estate in joint tenancy, and not a tenancy in common; and it must be admitted, we think, that the language employed was apt and sufficient for the accomplishment of that purpose. It only remains to be determined whether, under our statute, the right of survivorship can still be regarded as an incident of an estate in joint tenancy. The doubt on this question grows out of the apparent conflict between section 5, chapter 30, of the Revised Statutes, entitled "Conveyances," and section 1, chapter 76, entitled "Joint Rights and Obligations." These statutes are *in pari materia*, and are to be construed together, and very much aid in such construction may be obtained by examining their history, as a part of the legislation of the state. On the 13th day of January, 1831, the general assembly passed "An act concerning partitions and joint rights and obligations," the first and second sections of which were as follows: "Section 1. Be it enacted," etc., "that all joint tenants or tenants in common who now are or hereafter shall be possessed of any estate of inheritance, or estate less than those of inheritance, either in their own right or in the right of their wives, may be compelled to make partitions between them of such lands, tenements or hereditaments, as they now hold or hereafter shall hold, as joint tenants, or tenants in common. Provided, however, that no such partition, between joint tenants or tenants in common, who hold or shall hold estate for life or years, with others holding equal or greater estates, shall prejudice any entitled to the reversion or remainder, after the death of the tenants for life, or after the expiration of the years. Section 2. That if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivor or survivors, but descend or pass by devise, and shall be subject to debts, dower, charges, etc., or transmissible to executors or administrators, and be considered to every intent and purpose in the same view as if such deceased joint tenants had been tenants in common." Afterwards, on January 31, 1837, the general assembly passed

"An act concerning conveyances of real property," the fifth section of which was as follows: "No estate in joint tenancy, in any lands, tenements or hereditaments, shall be held or claimed under any grant, devise or conveyance whatever, heretofore or hereafter made, other than to executors and trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors or trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be a tenancy in common." In the Revised Statutes of 1845, section 2 of the act of 1821 appears as section 1 of chapter 56, entitled "Joint Rights and Obligations," while section 5 of the act of 1827 appears as section 5 of chapter 24, entitled "Conveyances," both chapters having been approved on the same day. In the Revised Statutes of 1874, section 2 of the act of 1821 again appears as section 1 of "An act to revise the law in relation to joint rights and obligations," approved February 25, 1874, and section 5 of the act of 1827 appears as section 5 of the "Act concerning conveyances," approved March 29, 1872, and in force July 1, 1872. Both sections have now been on the statute books concurrently since 1827, and both, since their original enactment, have been twice included, without change of phraseology, in general revisions of the statutes.

It seems plain that the act of 1821 undertook to deal only with joint tenancies and tenancies in common held by the tenants in their own rights, or in right of their wives. Such is the express limitation contained in the language of section 1, and that limitation undoubtedly was intended to apply to and control the entire act. No other tenancies were within the legislative contemplation. The act, therefore, had no application to estates held by executors, trustees or others holding estates *en autre droit*. But as to estates held by the tenants in their own rights, or in the right of their wives, whether held as joint tenants or tenants in common, the act gave the right to compel partition, and in cases of joint tenants, if partition was not made, the right of survivorship was taken away; and it was provided that the part of the tenant dying first should pass by descent or devise and be subject to debts, dower, charges, etc., and be transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if the deceased joint tenant had been a tenant in common. The effect of this statute, clearly, was to practically abolish joint tenancies where the estates were held by the tenants in their own rights or in the right of their wives, or, that which is the same thing, to convert them into tenancies in common. The right of survivorship, which is and always has been the principal and distinguishing incident of joint tenancies, was taken away; and upon the death of the tenant, without having made partition, the estate was to be treated and considered, to every intent and purpose, as a tenancy in common.

The act of 1827 made no reference to that of 1821, but, as it was the later expression of the legislative will, it had the effect of repealing or modifying the former act, in so far as it was inconsistent therewith. It becomes important then, in the first place, to determine the proper interpretation to be placed upon that act, standing by itself. In using without explanation or qualification the terms "joint tenancy" and "tenancy in common," terms having, at common law, a fixed and well understood meaning, it was doubtless intended to use them in their ordinary common-law sense. Its effect was to restore the right to create estates in joint tenancy, as known at common law, in so far as that right was abrogated by the act of 1821, rather by tacit recognition than by express words, and then undertook to change the rule of presumptions obtaining at common law where a conveyance of lands was made to two or more persons. Where an estate was conveyed to a plurality of persons without adding any restrictive, exclusive or explanatory words, such conveyance, at common law, was held to constitute the grantees joint tenants, and not tenants in common; it being necessary, in order to create a tenancy in common by deed, to add exclusive or explanatory words, so as to expressly limit the estate to the grantees, to hold as tenants in common and not as joint tenants. 2 Bl. Comm. 180, 193. By section 5 of the act of 1827, this rule, except in cases of conveyances to executors or trustees, was precisely reversed. Under that section a conveyance to two or more persons, without restrictive or explanatory words, created a tenancy in common; and in order to create a joint tenancy, the estate had to be expressly declared to pass, not in tenancy in common but in joint tenancy. If the question had arisen at any time after the passage of the act of 1827, and prior to the revision of 1845, it would have presented no material difficulty. The rule established by the act of 1827 would have been held to prevail, that being the latest act; and as that act clearly recognized the existence of estates in joint tenancy, a well-known species of common-law estate, and expressly provided the mode in which they might be created, the result would have logically followed that joint estates created in the manner prescribed were joint tenancies in the common-law sense, and possessing the qualities and incidents which the common law attaches to them, notwithstanding the provisions of the act of 1821 to the contrary. The view that the estate in joint tenancy referred to in the act of 1827 was the common-law estate, with its common-law incidents, is strengthened by reference to the provisions of the act in relation to the tenancy when vested in executors or trustees. As we have already seen, tenancies of that character are not within the purview of the act of 1821, nor affected by its provisions. They were doubtless excluded from the operation of that act on account of the manifest impropriety of compelling partition between joint tenants holding in a trust capacity, and the obvious advantages resulting

from an application of the rule of survivorship to joint tenants of that character. The act of 1827 also expressly excepts from its operation executors and trustees, thus keeping in force, as to them, the common-law rule, but provides that in other cases, to create a joint tenancy, it must be expressly declared in the deed to be such, and not a tenancy in common. But there is nothing in the act of 1827 furnishing the least indication that the legislature intended to attach to joint tenancies, where the tenants held in their own right, any other or different incidents than those which properly belonged to the estate where executors or trustees were the tenants. It is beyond question that, in the latter class of joint tenancies, it was the intention of the act that the incident of survivorship should prevail; and, as the act furnishes no indication to the contrary, it would seem to be equally clear that the same rule was intended to apply to those where the tenants were such in their own right.

Up to the passage of the Revised Statutes of 1845 the law on the subject, so far as was declared by statute, was to be found in the act of 1821, as modified by the act of 1827; the latter act prevailing, and furnishing the rule in all matters where the two were inconsistent with each other. It would seem, therefore, that the re-enactment of these two statutes, without change of phraseology, in the revision of 1845, and again in the revision of 1874, was intended as a re-adoption of the statutory law on the subject in precisely the condition in which it was before any revision was made. It has been held, and we think correctly, that, where there are repugnant provisions in a revised code, those portions which are transcribed from later statutes must be deemed to repeal sections adopted earlier, or transcribed from earlier statutes, or to so modify them as to produce agreement between such repugnant provisions. *End. Interp. St.*, § 183. In *Ex parte Ray*, 45 Ala. 15, a revised code had been enacted, embracing various prior statutes enacted at different times, and, in giving construction to a particular portion of such code, it was said: "All the several sections on the same subject should be construed together. By being embraced in the code, they are formed into a system on the subject to which they refer, and by the adoption of the code the legislature has, as it were, laid its hands on them, and given them new life and vitality, as a body. For this reason, if for no other, they should be interpreted and construed together, and, if possible, made consistent and in harmony with each other. If, however, this, in any particular case, cannot be done, then the earlier sections, or sections taken from earlier acts, must be held to be repealed, or so modified as to be in agreement with the later sections." See also *O'Neal v. Robinson*, 45 Ala. 536; *State v. Heidorn*, 74 Mo. 410. Section 2, chapter 181, of the Revised Statutes of 1874 is as follows: "The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such

prior provisions, and not as a new enactment." As applicable to our present Revised Statutes, this section furnishes a rule of construction. Under it, as it would seem, a statute gains no additional force by being included in a revision, but is only continued as a part of our statutory law, having the same force and effect as before. Under this rule, the fact that one of the statutes now under consideration was re-enacted more recently than the other in the revision of 1874 is immaterial, as in both cases an old statute was continued in force, and no new one enacted. Under these circumstances, we are disposed to hold that the two statutes under consideration still sustain to each other the same relation which existed prior to the revision of 1845, and that they should be construed now the same as they would have been construed prior to that revision. As a consequence, the act of 1827 must still be regarded as repealing or modifying the act of 1821, to the extent of permitting parties to create the common-law estate of joint tenancy, with its common-law incidents, by expressly declaring, in a deed running to two or more grantees, that the estate conveyed shall pass, not in tenancy in common, but in joint tenancy.

Applying these conclusions to the case before us, it follows that upon the death of Anna Mayer, intestate, her share passed to her husband by right of survivorship, and that he thereby became vested with the entire estate as tenant in severalty. It follows that no estate or interest in the land passed by inheritance to Anna M. Feltgen, the plaintiff, on the death of her mother, but that the conveyance from Peter Mayer to the defendants vested in them the entire estate. The plaintiff having failed to establish any interest in the land, the judgment in her favor is erroneous. It will therefore be reversed, and the cause will be remanded to the superior court. Judgment reversed.

Of the two sections of the statute under consideration in this case, that adopted in 1821 is now in force as section 1 of the act in regard to joint rights and obligations, and that adopted in 1827 is now in force in section 5 of the conveyance act. The re-adoption of these two sections by the legislature, at several different times since their original passage, indicates an intention on the part of the lawmaking power that they should both stand together, and that the one should not operate as a repeal of the other. There is no necessary conflict between them. They can be so construed as to harmonize with each other. Section 1 refers to both personal and real property. Section 5 refers to real property alone. Section 1, standing by itself, is broad enough to abolish the right of survivorship, as between joint tenants, and to convert the estate of joint tenancy into an estate of tenancy in common. But section 5 was evidently intended to be a qualification of the broad rule laid down in section 1, so far as lands, tenements and hereditaments are concerned, and was designed to limit the application of the rule to cases where the grant, devise or conveyance did not, in express terms,



create an estate of joint tenancy. Section 5 is merely a recognition of the rule that the law will effectuate the intention of the parties, where such intention is clearly manifest, whether in wills, deeds or contracts. It is a mistake to suppose that the estate of joint tenancy has been prohibited by our statute. The creation of such an estate is not forbidden. It does not exist by operation of law, but it may exist by the express declaration of the parties. No other construction could be given to the language of section 5. By the terms of that section, an estate in joint tenancy may be held in lands under a conveyance, where the premises mentioned in the conveyance are thereby expressly "declared to pass, not in tenancy in common, but in joint tenancy." Joint tenancy shall be deemed to be tenancy in common, "unless otherwise expressly declared," except, of course, where the grant or devise is to executors and trustees. The law will construe the estate to be a tenancy in common, and not a joint tenancy, where no contrary intention is expressly declared in the instrument; but where the instrument expressly declares that the land shall pass, not in tenancy in common, but in joint tenancy, the law will permit the estate in joint tenancy to exist. It will not do to say that section 1 abolished the right of survivorship, and that section 5 merely permitted a joint tenancy without the right of survivorship to be created by an express declaration in the devise, grant, or conveyance. "The doctrine of survivorship, or *jus accrescendi*, is the distinguishing incident of title by joint tenancy; and therefore, at common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors." 4 Kent, Comm. 360. It can hardly be presumed that the legislature, in authorizing an estate by joint tenancy to be created by an express declaration in the grant or devise, referred to those technical joint tenancies arising from the unities of time, title, interest, and possession. If such a construction of section 5 is to prevail, then no right of survivorship was reserved to executors and trustees by that section. In both sections 1 and 5, joint tenancy is spoken of as the antithesis of tenancy in common; and the distinguishing feature of the latter is that a tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate. In Kent's Commentaries we find the following: "In New York, . . . estates in joint tenancy were abolished, except in executors and other trustees, unless the estate was expressly declared, in the deed or will creating it, to pass in joint tenancy. . . . In the states of Maine, . . . Illinois, and Delaware, joint tenancy is placed under the same restrictions as in New York, and it cannot be created but by express words; and, when lawfully created, it is presumed that the common-law incidents belonging to that tenancy follow." 4 Kent, Comm. 361, 362. It follows that the estate in joint tenancy, which may be expressly declared to exist by section 5, includes the right of survivorship as one

of its common-law incidents. In *Arnold v. Jack's Ex'rs*, 24 Pa. St. 57, the supreme court of Pennsylvania, in commenting upon a statute of that state whose language is the same as that of said section 1, say: "It is a question worthy of consideration whether the provisions of the act . . . apply to a joint tenancy created by express words in a devise." That is to say, it is a question worthy of consideration whether the provisions of section 1 would apply where the joint tenancy was created by express words in the grant or devise, even if that section had stood alone, and section 5 had never been enacted. In commenting upon the legislation in reference to joint tenancy, Pomeroy, in his work on Equity Jurisprudence, says: "This legislation, throughout all the states, has declared that a conveyance of land to two or more grantees shall, unless a contrary intention is clearly expressed, create an ownership in common and not a joint ownership." 1 Pom. Eq. Jur. § 408. In *Stimpson v. Batterman*, 5 Cush. 153, the devise was to the "children and survivor or survivors of them;" and it was held that these words were apt words to create an estate of joint tenancy, and that the children took as joint tenants. In *Mittel v. Karl*, 133 Ill. 65, 24 N. E. R. 553, it was held that a deed to a man and his wife, and "the survivor of them, in his or her own right," gave to the grantee dying first an estate for life, with remainder in fee to the survivor. What is the substantial difference between deeding or devising land to two persons and the survivor of them, and deeding or devising land to two persons to be held in joint tenancy? The distinguishing feature of joint tenancy is the right of the survivor to take the whole estate. If the statute does not prohibit the conveyance or devise of land to two persons, and the survivor of them, so as to give the survivor the right to take the whole estate, it is difficult to see why the statute should be construed as prohibiting land from being held in joint tenancy, so far as the right of survivorship is involved in joint tenancy, if the deed or devise expressly declares that such land shall be held in joint tenancy, and not in tenancy in common. Evidently, the statute does not prevent parties from conveying or devising their lands so as to enforce the right of survivorship, provided they indicate their intentions by clear and express declarations in the deed or will. The question here discussed has never before been fully and fairly presented to this court, as arising directly out of the facts involved. If, in any decisions heretofore made, expressions have been made use of which are seemingly at variance with these views, such expressions cannot be regarded otherwise than as mere *dicta*. It follows from what has been said that the deed from Schintz to Peter Mayer and Anna Mayer so far conveyed to them an estate in joint tenancy as that Peter Mayer, the survivor, took the whole title in fee to the lots after the death of his wife. Therefore, the judgment below should have been for the defendants.

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**Thornburg et al. v. Wiggins et ux.**

Decision by the Supreme Court of Indiana, October 19, 1893. Opinion by Dailey, J.

*(Reported in 135 Ind. 178.)*

This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate, therein described, containing eighty acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate which they took and accepted, ever since have held, and now hold by entireties and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of \$403.70 and costs against one John T. Burroughs and the appellee Daniel S. Wiggins as partners doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment, and placed in the hands of the appellant Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof taken as the property of said appellee Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded, by the direction of said Howard and Gaston, to advertise said real estate for sale under said execution and levy to make said debt, and did on the 8th day of June advertise the same for sale on the 3d day of July, 1886, and will on said day sell the same unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellees' title, etc. The second paragraph is the same as the first in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties. The granting clause of the deed is as follows: "This indenture witnesseth that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph county, in the state of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Higgins, his wife, in joint tenancy," etc. Appellants sepa-

rately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers. Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution.

A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent, in rents and profits; but upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, or years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation, and they cannot arise except by the instrument providing for such tenancy. *Griffin v. Lynch*, 16 Ind. 398. 9 Am. & Eng. Enc. Law, 850, says: "Husband and wife are, at common law, one person, so that when realty vests in them both equally, . . . they take as one person; they take but one estate, as a corporation would take. In the case of realty they are seized, not *per my et per tout*, as joint tenants are, but simply *per tout*; both are seized of the whole, and, each being seized of the entirety, they are called 'tenants by the entirety,' and the estate is an estate by entireties. . . . Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seized of the whole; the estate is inseverable, cannot be partitioned; neither husband nor wife can alone affect the inheritance; the survivor takes the whole." This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are at the time husband and wife, commonly called 'estates by entirety.'" As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law. *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 424. Strictly speaking, estates by entireties are not joint tenancies (*Chandler v. Cheney*, 37 Ind. 391; *Hulett v. Inlow*, 57 Ind. 412), the husband and wife being seized, not of moieties, but both seized of the entirety *per tout*, and not *per my* (*Jones v. Chandler*, 40 Ind. 589; *Davis v. Clark*, *supra*; *Arnold v. Arnold*, *supra*). It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants of the entirety. It is not even necessary that they be described as such, or their marital relation referred to. *Morrison v. Seybold*, 92 Ind. 302; *Hadlock v. Gray*,

104 Ind. 596, 4 N. E. R. 167; Dodge v. Kinzy, 101 Ind. 102; Hulett v. Inlow, 57 Ind. 414; Chandler v. Cheney, 37 Ind. 395. But the court has said that the general rule may be defeated by the expression of conditions, limitations and stipulations in the conveyance which clearly indicate the creation of a different estate. Hadlock v. Gray, *supra*; Edwards v. Beall, 75 Ind. 401. Having its origin in the fiction of common-law unity of husband and wife, the courts of some states have held that married women's acts extending their rights destroyed estates by entirety, but this court holds otherwise (Carver v. Smith, 90 Ind. 226); and the greater weight of authority is in its favor. Our decisions hold that neither alone can alienate such estate. Jones v. Chandler, *supra*; Morrison v. Seybold, *supra*. There can be no partition. Chandler v. Cheney, 37 Ind. 391. A mortgage executed by the husband alone is void (Jones v. Chandler, 40 Ind. 391), and the same is true of a mortgage executed by both to secure a debt of the husband (Dodge v. Kinzy, 101 Ind. 105); and the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it (State v. Kennett, 114 Ind. 160, 16 N. E. R. 173). A judgment against one of them is no lien upon it. Ditching Co. v. Beck, 99 Ind. 250; McConnell v. Martin, 52 Ind. 434; Orthwein v. Thomas (Ill. Supp.), 13 N. E. R. 564. Upon the death of one, the survivor takes the whole in fee. Arnold v. Arnold, *supra*. The deceased leaves no estate to pay debts (Simpson v. Pearson, 31 Ind. 1); and during their joint lives there can be no sale of any part on execution against either (Carver v. Smith, *supra*; Dodge v. Kinzy, 101 Ind. 105; Hulett v. Inlow, 57 Ind. 412; Chandler v. Cheney, *supra*; Davis v. Clark, *supra*; McConnell v. Martin, *supra*; Cox's Adm'r v. Wood, 20 Ind. 54). The statutes extending the rights of married women have no effect whatever upon estates by entirety. Carver v. Smith, 90 Ind. 223. Such estate is in no sense either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent. Enyeart v. Kepler, 118 Ind. 34, 20 N. E. R. 539. The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property with us for eighty-six years. Section 2922, Revised Statutes of 1881, provides that "all conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy." Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife. Under a statute of the state of Michigan,

similar in all its essential qualities to our own, the court held that, "where lands are conveyed in fee to husband and wife, they do not take as tenants in common" (*Fisher v. Provin*, 25 Mich. 347), they take by entireties. Whatever would defeat the title of one would defeat the title of the other. *Manwaring v. Powell*, 40 Mich. 371. They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest; neither can be said to own an undivided half. *Insurance Co. v. Resh*, *id.* 241; *Allen v. Allen*, 47 Mich. 74, 10 N. W. R. 113.

While the rule of entireties was predicated upon a fiction, the legislative intent in this state has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. *Carver v. Smith*, 90 Ind. 227. "Where a rule of property has existed for seventy years, and is sustained by a strong and uniform line of decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule is founded. Such a rule of property will be overruled only for the most cogent reasons, and upon the strongest convictions of its incorrectness. . . . It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge in some particulars the power of the wife, which existed already under the acts of 1852 and the years following. . . . It did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife they should hold by entireties, and not as joint tenants or tenants in common." *Carver v. Smith*, *supra*. In *Chandler v. Cheney*, 37 Ind., on page 396, the court says: "It was a well-settled rule at common law that the same form of words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted." The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended. Where a contrary intention is clearly expressed in the deed, a different rule obtains. "A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Prest. Est. 132; 3 Bl. Comm., Sharswood's note; 4 Kent, Comm., side page 363; 1 Bish. Mar. Wom., § 616 *et seq.*; Freem. Coten., § 72; *Fladung v. Rose*, 58 Md. 13-24. "And in case of devise and conveyances to husband and wife together, though

it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stew. Husb. & Wife, §§ 307-310; Tied. Real Prop., § 244. "And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc. (*Hoffman v. Stigers*, 28 Iowa, 310; *Brown v. Brown*, 133 Ind. 476, 32 N. E. R. 1128), "so it seems that husband and wife may by express words be made tenants in common by gift to them during coverture" (*McDermott v. French*, 15 N. J. Eq. 80). In *Hadlock v. Gray*, 104 Ind. 599, 4 N. E. R. 167, a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the court say: "The language employed in the deed plainly declares that Isaac Cannon and Mary Cannon are not to take as tenants by entirety. The result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. . . . The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife." The court further say: "It is true that, where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety. . . . But, while the general rule is as we have stated it, there may be conditions, limitations and stipulations in the deed conveying the property which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear upon principle that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife." The court then adopts the language of Washburn (1 Washb. Real Prop. 674) and Tiedeman, *supra*. In *Edwards v. Beall*, *supra*, the court hold that when lands are granted husband and wife as tenants in common they will hold by moieties, as other distinct and individual persons would do. If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants, because by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties; joint tenancy would be superseded or put in abeyance by the estate created by law—tenancy by entirety. The result of such reasoning would be to destroy the contractual power of the parties where this re-

lationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy or in common, if appropriate language be expressed in the deed or will creating it; and we know of no more apt term to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy." These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold, not by entireties, but in joint tenancy. A joint tenant's interest in property is subject to execution. *Freem. Ex'ns*, 125. Judgment reversed, with instructions to the circuit court to sustain the demurrer to each paragraph of the complaint.

### Dyer v. Clark et al.

Decision by Supreme Judicial Court of Massachusetts, March Term, 1843. Opinion by Shaw, C. J.

(*Reported in 5 Metc. 562.*)

This is a suit in equity by the surviving partner of the firm of Burleigh & Dyer, established by articles of copartnership, under seal, for the purpose of carrying on the business of distillers. The principal question is one which has arisen in several other cases, and is this: whether real estate, purchased by copartners from partnership funds, to be held, used and occupied for partnership purposes, is to be deemed in all respects real estate, in this commonwealth, to vest in the partners severally as tenants in common, so that, on the decease of either, his share will descend to his heirs, be chargeable with his wife's dower, and in all respects held and treated as real estate held by the deceased partner as a tenant in common; or, whether it shall be regarded as *quasi*-personal property, so as to be held and appropriated as personal property, first to the liquidation and discharge of the partnership debts, and to the adjustment of the partnership account, and payment of the amount due, if any, to the surviving partner, before it shall go to the widow and heirs of the deceased partner. This is a new question here, and comes now to be decided for the first time.

There are some principles, bearing upon the result, which seem to be well settled, and may tend to establish the grounds of equity and law upon which the decision must be made. It is considered as established law that partnership property must first be applied to the payment of partnership debts, and therefore that an attachment of partnership property for a partnership debt, though subsequent in time, will take



precedence of a prior attachment of the same property for the debt of one of the partners. It is also considered that, however extensive the partnership may be, though the partners may hold a large amount and great variety of property, and owe many debts, the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner or partners. 1 Ves. Sr. 242.

The time of the dissolution of a partnership fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners, and their respective shares in the joint fund. The debts may be numerous, and the funds widely dispersed and difficult of collection; and therefore much time may elapse before the affairs can be wound up, the debts paid, and the surplus put in a condition to be divided. But whatever time may elapse before the final settlement can be practically made, that settlement, when made, must relate back to the time when the partnership was dissolved, to determine the relative interests of the partners in the fund.

When, therefore, one of the partners dies, which is *de facto* a dissolution of the partnership, it seems to be the dictate of natural equity that the separate creditors of the deceased partner, the widow, heirs, legatees, and all others claiming a derivative title to the property of the deceased, and standing on his rights, should take exactly the same measure of justice as such partner himself would have taken had the partnership been dissolved in his life-time; and such interest would be the net balance of the account, as above stated.

Such indeed is the result of the application of the well known rules of law when the partnership stock and property consist of personal estate only. And as partnerships were formed mainly for the promotion of mercantile transactions, the stock commonly consisted of cash, merchandise, securities, and other personal property; and therefore the rules of law governing that relation would naturally be framed with more especial reference to that species of property. It is therefore held that, on the decease of one of the partners, as the surviving partner stands chargeable with the whole of the partnership debts, the interest of the partners in the chattels and choses in action shall be deemed so far a joint tenancy as to enable the surviving partner to take the property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money, and the debts are paid; though, for the purpose of encouraging trade, it is held that the harsh doctrine of the *jus accrescendi*, which is an incident of joint tenancy, at the common law, as well in real as in personal estate, shall not apply to such partnership property; but, on the contrary, when the debts are all paid, the effects of the partnership reduced to money, and the purposes of the partnership accomplished, the surviv-

ing partner shall be held to account with the representatives of the deceased for his just share of the partnership funds.

Then the question is whether there is anything so peculiar in the nature and characteristics of real estate as to prevent these broad principles of equity from applying to it. So long as real estate is governed by the strict rules of the common law, there would be, certainly, great difficulty in shaping the tenure of the legal estate in such form as to accomplish these objects. Should the partners take their conveyance in such mode as to create a joint tenancy, as they still may, though contrary to the policy of our law, still it would not accomplish the purposes of the parties; first, because either joint tenant might, at his option, break the joint tenancy and defeat the right of survivorship, by an alienation of his estate, or (what would be still more objectionable) the right of survivorship at the common law would give the whole estate to the survivor, without liability to account, and thus wholly defeat the claims of the separate creditors, and of the widow and heirs of the deceased partner.

But we are of opinion that the object may be accomplished in equity so as to secure all parties in their just rights, by considering the legal estate as held in trust for the purposes of the partnership; and since this court has been fully empowered to take cognizance of all implied as well as express trusts, and carry them into effect, there is no difficulty, but on the contrary great fitness, in adopting the rules of equity on the subject, which have been adopted for the like purpose, in England and in some of our sister states. And it appears to us that considering the nature of a partnership, and the mutual confidence in each which that relation implies, it is not putting a forced construction upon their act and intent to hold that when property is purchased in the name of the partners, out of partnership funds and for partnership use, though by force of the common law they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes, by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable, and until he has come to a just account with his partner. Each has an equitable interest in that portion of the legal estate held by the other, until the debts, obligatory on both, are paid, and his own share of the outlay for partnership stock is restored to him. This mutual equity of the parties is greatly strengthened by the consideration that the partners may have contributed to the capital stock in unequal proportions, or indeed that one may have advanced the whole. Take the case of a capitalist who is willing to put in money, but wishes to take no active concern in the conduct of business, and a man who has skill, capacity, integrity and industry to make him a most useful active partner, but without property, and

they form a partnership. Suppose real estate, necessary to the carrying on of the business of the partnership, should be purchased out of the capital stock, and on partnership account, and a deed taken to them as partners, without any special provisions. Credit is obtained for the firm as well on the real estate as the other property of the firm. What are the true equitable rights of the partners, as resulting from their presumed intentions, in such real estate? Is not the share of each to stand pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest, indirectly, in the same appropriation; not because they have any lien, legal or equitable (2 Story, Eq., § 1253), upon the property itself, but on the equitable principle, which determines that the real estate so held shall be deemed to constitute part of the fund from which their debts are to be paid, before it can be legally or honestly diverted to the private use of the partners. Suppose this trust is not implied, what would be the condition of the parties, in the case supposed, in the various contingencies which might happen? Suppose the elder and wealthy partner were to die. The legal estate descends to his heirs, clothed with no trust in favor of the surviving partner. The latter, without property of his own, and relying on the joint fund, which, if made liable, is sufficient for the purpose, is left to pay the whole of the debt, whilst a portion, and perhaps a large portion, of the fund bound for its payment is withdrawn. Or suppose the younger partner were to die, and his share of the legal estate should go to his creditors, wife or children, and be withdrawn from the partnership fund; it would work manifest injustice to him who had furnished the fund from which it was purchased. But treating it as a trust, the rights of all parties will be preserved; the legal estate will go to those entitled to it, subject only to a trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound; and, subject to this, all those will take who are entitled to the property, namely, the creditors, widow, heirs and all others standing on the rights of the deceased partner.

It may happen that real estate may be so purchased by partners, and out of partnership funds, in such manner as to preclude such implied trust, and indicate that the parties intended to purchase property to be held by them separately for their separate use; as where there is such an express agreement at the time of the purchase, or a provision in the articles of copartnership, or where the price of such purchase should be charged to the partners respectively, in their several accounts with the firm. This would operate as a division and distribution of so

much of the funds, and each would take his share divested of any implied trust. If, in the conveyance, the grantees should be described as tenants in common, it would be a circumstance bearing on the question of intent, though perhaps it might be considered a slight one, because those words would merely make them tenants in common of the legal estate, which, by operation of law, they would be without them. But, as we have already seen, such legal estate is not at all incompatible with an implied trust for the partnership.

The result of this part of the case seems to us to be this: that when, by the agreement and understanding of partners, their capital stock and partnership fund consist, in whole or in part, of real estate—inasmuch as it is a well-known rule governing the relation of partnership that neither partner can have an ultimate and beneficial interest in the capital until the debts are paid and the account settled; that both rely upon such rule and tacitly claim the benefit of it, and expect to be bound by it,—the same rule shall extend to real estate. The same mutual confidence, which governs the relation in other respects, extends to this; and, therefore, when real estate is purchased as part of the capital, whether by the form of the conveyance the legal estate vests in them as joint tenants or tenants in common, it vests in them and their respective heirs clothed with a trust for the partners in their partnership capacity, so as to secure the beneficial interest to them until the purposes of the partnership are accomplished. It follows, as a necessary consequence, that such partnership real estate cannot be conveyed away and alienated by one of the partners alone without a breach of such trust; and that such a conveyance would not be valid against the other partner, unless made to one who had no notice, actual or constructive, of the trust. But, if a person knows that a particular real estate is the partnership property of two or more, and he attempts to acquire a title to any part of it from one alone, without the knowledge or consent of the other, there seems to be no hardship in holding that he takes such title at his peril, and on the responsibility of the person with whom he deals.

But we think the same conclusion is well supported by authorities, although there has been some diversity of opinion amongst the earliest cases.

The adjudged cases were so fully examined by the counsel in their arguments that it is unnecessary to state them in detail. The principles which have already been suggested as the grounds on which we decide the present case were applied in *Phillips v. Phillips*, 1 Mylne & K. 649; *Broom v. Broom*, 3 Mylne & K. 443; *Sigourney v. Munn*, 7 Conn. 11; *Hoxie v. Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802. In these cases all the previous decisions on the subject were carefully considered. See also 3 Kent, Comm. (4th ed.) 36–39; 1 Story, Eq., secs. 674, 675; 2 Story, Eq., sec. 1207; Colly. Partn. 76; Cary, Partn. 27, 28; *Houghton v. Houghton*, 11 Sim. 491.

It has been supposed that the case of *Goodwin v. Richardson*, 11 Mass. 469, stands opposed to the decision now made. I do not think it does. That case was decided in 1814, before equity powers existed in this commonwealth on the general subject of trusts. It was in terms a question as to the vesting of the real estate; and the court were bound to decide the case for the defendant, if they found, upon the facts, that the estate in question had vested in the partners, on foreclosure, as tenants in common. Had they decided the other way, they must have decided that partners, taking real estate in satisfaction of a partnership debt, by foreclosing a mortgage, would hold the estate as joint tenants with right of survivorship at law, without liability to account — a principle directly opposed to the statutes of 1785, chapter 62, respecting joint tenancy; because in that case and at that time the real estate must descend and vest according to the rules of law, and there was no court of equity competent to require the surviving partner to account with the representatives of the deceased party.

In that case, as it happened, both the separate estate and the partnership estate were insolvent, and therefore good justice would have been done in deciding that the plaintiff should recover for the benefit of the partnership creditors. But the court were deciding upon a rule of law which must apply to all cases, and they could not have decided that for the plaintiff without holding that all such estate, held by partners, should be deemed joint estate, with a right of survivorship at law, and without liability to account; a rule opposed to the plainest principles of equity, and to the spirit, if not to the letter, of the statute respecting joint tenancy. The court were dealing solely with a question of law, in determining a legal estate, and intimate that a court of equity might make joint real estate applicable, as personal, to the payment of partnership debts. We consider, therefore, that that decision is not opposed to the decision, upon equitable principles, to which we now propose to come.

On the facts of the present case, we are of opinion that the real estate in question was a part of the capital stock purchased out of the partnership funds, for the partnership use, and for the account of the firm. The partners entered into articles as distillers. The business required a large building and fixtures, which they purchased and paid for in part out of the joint funds, and gave notes in the partnership name for the remainder of the price, and the estate was regarded by them as partnership effects. The repairs and improvements were also charged to joint account. These are all decisive indications of joint property. The plaintiff has received a sum in rents and profits that have accrued since his partner's death. The defendant, Clark, as administrator of Burleigh, the deceased partner, has sold an undivided half of the property as his, under a license, and with the assent of the plaintiff. The widow joined to release her dower for a nominal sum. But we cannot

perceive that the right of the widow is distinguishable from that of the creditors and heirs of the deceased partner. As far as this estate was held in trust by her deceased husband, she was not entitled to dower. For all beyond that she will be entitled, because he held it as legal estate, unless she is barred by her release; of which we give no opinion. The plaintiff is entitled to a decree charging the amount of rents and profits in his hands, and so much of the proceeds of the sale made by the administrator, as will be sufficient to discharge the balance of the partnership account; and the rest of the proceeds will remain in the hands of Clark, the administrator of Burleigh, to be distributed according to law.

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## CHAPTER X.

### ESTATES UPON CONDITION.

#### Warner v. Bennett et al.

Decision by Supreme Court of Errors of Connecticut, April, 1863.  
Opinion by Sanford, J.

*(Reported in 31 Conn. 468.)*

In our opinion the conveyance from Tomlinson to Bennett and others was of a fee-simple estate upon condition expressed in the deed. The instrument is a common deed of bargain and sale to the grantees, their heirs, and assigns forever, for certain used specified in the deed, which contains the following clause: "The conditions of the within deed are such that whenever the within named premises shall be converted to any other use than those named within, and the within grantees shall knowingly persist in the use thereof for any purpose whatever except such as are described in said within deed, the said grantees forfeit the right herein conveyed to the within described premises, upon the grantor paying to the said Hatch and Bennett and other stockholders the appraised value of such buildings as may be thereon standing."

Blackstone says estates upon condition "are such whose existence depends upon the happening or not happening of some uncertain event whereby the estate may be originally created or enlarged, or finally defeated." 2 Bl. Comm. 151. Littleton says, "It is called an estate upon condition because that the estate of the feoffee is defeasible if the condition be not performed." Co. Litt., § 325. "A condition is created by inserting the very word 'condition' or 'on condition' in the agreement." 1 Bouv. Inst. 285. Conditions are precedent or subsequent. "Precedent are such as must happen or be performed before the estate

can vest or be enlarged. Subsequent are such by the failure or non-performance of which an estate already vested may be defeated." 2 Bl. Comm. 154. In the case of a condition "the estate or thing is given absolutely without limitation, but the title is subject to be divested by the happening or not happening of an uncertain event. Where, on the contrary, the thing or estate is granted or given until an event shall have arrived, and not generally with a liability to be defeated by the happening of the event, the estate is said to be given or granted subject to a limitation." 2 Bouv. Inst. 275; 2 Bl. Comm. 155.

In the case before us the estate vested in the grantees upon the delivery of the deed, to have and to hold to them, their heirs and assigns, not until they should convert the property to other uses than those specified in the deed, nor so long as they should continue to use it for the purposes specified, but forever; with a proviso or condition expressed in the deed, that if they should convert the property to other uses they should forfeit their estate. The words employed are most appropriate and apt to make an express condition in deed. They are "the conditions of the within deed are such," etc. And in *Portington's Case*, 10 Coke, 41a, it is said that "express words of condition shall not be taken for a limitation." It has indeed been held that they may be so taken where the estate is limited over to a third person upon the breach or non-performance of the condition (*Fry's Case*, 1 Inst. 202), but there is no such limitation over in the case before us. So when it is said that "whenever the within named premises shall be converted to any other use," etc., "the grantees forfeit the right herein conveyed," it is clearly indicated that the estate thus forfeited by the misappropriation is to be cut off before the time originally contemplated for its termination by the parties.

But it is said that by the terms of the instrument the forfeiture depends not merely upon the misappropriation of the property by the grantees, but also upon the grantor's payment of the appraised value of the building. Suppose it is so, how can that affect the question whether this is a condition in deed or a limitation? No matter how many events the forfeiture depends upon, nor how many individuals must act in producing them, when all those events concur and co-exist the forfeiture is effected as completely as if it depended upon the occurrence of a single event, and the action or omission of a single individual. But the payment for the building was not an event upon which the forfeiture depended. It was merely a duty imposed upon the grantor by the contract in addition to that which the law imposed, to enable him to take advantage of the breach of condition and enforce the forfeiture. His legal obligation to enter for breach of the condition was in no wise affected by it. The estate conveyed by the deed was not an easement, or any other right or interest in the property less than a fee simple. The fact that the instrument was signed by

both of the parties to it is of no importance. They were neither more nor less bound by the stipulations and conditions contained therein by reason of such signature. The instrument contains no contract on the part of the grantor to pay for the building. The provision upon that subject operates as a qualification of the grantor's right to enforce the forfeiture and regain his property, but operates in no other way. But for that provision the estate granted could have been put an end to, and revested in the grantor, by an entry only; under that provision an entry could be made available only by payment for the building also.

We think it clear that the estate of the grantees was an estate on condition in deed, and that it was an estate upon condition subsequent; and hence, notwithstanding a breach of the condition by reason of which the estate might have been defeated, it must continue to exist in the grantees, with all its original qualities and incidents, until the grantor or his heirs, by an entry (or its equivalent, a continual claim), have manifested, in the way required by law, their determination to take advantage of the breach of condition to avail themselves of their legal rights, and to reclaim the estate thus forfeited.

The law upon this point is thus laid down by Professor Washburn, in the first volume of his treatise on Real Property (page 450), with accuracy and precision. "A condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. Notwithstanding its breach, the estate, if a freehold, can only be defeated by an entry made, and until that is done it loses none of its original qualities or incidents." See also *Id.* 452; 2 Bl. Comm. 155; 2 Cruise, Dig. 42.

But there is in this bill no allegation that an entry for condition broken was ever made. No right to maintain this suit is disclosed, no title to the property is set up, nothing is claimed but a right of entry for condition broken. And for this reason, if for no other, the bill is insufficient, and the decree must be pronounced erroneous.

The allegation in relation to an abandonment of the property is immaterial. It is not averred that the grantees had abandoned the property, but only that they had abandoned it "so far as the uses named in said deed are concerned;" that is, that they had ceased to use the property for the purposes for which the grant was made, not that they had ceased to use it altogether. What effect an absolute and entire abandonment of the property by the grantees would have had upon the legal or equitable rights of this petitioner, we are not now called upon to decide.

Secondly. A right of entry for condition broken is not assignable at common law, and we have no statute which makes it so. 2 Cruise, Dig. 4; 4 Cruise, Dig. 113; 1 Spence, Eq. Jur. 153; 1 Swift, Dig. 93. The grantor or his heirs only can enter for breach of such condition. 1 Washb. Real Prop. 451; 2 Cruise, Dig. 44. The petitioner, therefore,



could have obtained no right or title to make an entry for breach of the condition, and without such entirety the estate of the grantees could not be terminated, and no suit at law or in equity could be maintained against the occupant of the property.

Thirdly. If there was a breach of the condition and a forfeiture of the grantees' estate in consequence, and if a right of entry could be and was in fact assigned to the petitioner, still the petitioner could not obtain the relief for which he seeks in a court of equity, because that court never lends its aid to enforce a forfeiture. 4 Kent, Comm. 130; 2 Story, Eq. Jur., § 1319; *Livingston v. Tompkins*, 4 Johns. Ch. 415.

Lastly. If the right, title or interest, whatever it was, of the grantor or his heirs was assignable, and was assigned to and vested in the petitioner, as he claims, he had no occasion to come into a court of equity for relief. We do not see why he might not have entered for breach of the conditions, requested the respondent to unite with him in procuring an appraisal of the building, if he refused procured such appraisal without the respondent's co-operation, tendered the amount of the appraisal, and brought his action of ejectment. The petitioner's legal right, if he had it, to put an end to the grantees' estate and obtain possession of the property, we think could have been defeated by the respondent's refusal to co-operate in the appraisal or accept the tender. See 1 Swift, Dig. 295; Powell, Cont. 417; *Whitney v. Brooklyn*, 2 Conn. 406. We know of no power in a court of equity to compel the respondent to join the petitioner in procuring an appraisal, nor to make one, in such a case as this; and we see no occasion for the exercise of such a power if it exists. We think the petitioner has an adequate remedy for the enforcement and protection of all his rights at law.

There is manifest error in this record.

In this opinion the other judges concurred, except Dutton, J., who, having tried the case in the court below, did not sit.

### **Henderson et al. v. Hunter et al.**

Decision by Supreme Court of Pennsylvania, January 4, 1869. Opinion by Agnew, J.

*(Reported in 59 Pa. St. 335.)*

This was an action of trespass by church trustees under a deed of trust made by Thomas Pillow in 1836, for taking down and removing the materials of a church building in 1867.

The case turns on the limitation in the deed. The legal estate of the trustees clearly has no duration beyond the use it was intended to protect. The word "successors" is used to perpetuate the estate, but as the trustees are an unincorporated body having no legal succession,

there is nothing in the terms of the grant to carry the trust beyond its appropriate use. This brings us to the limitation of the use itself.

It is for the erection of "a house or place of worship for the use of the members of the Methodist Episcopal Church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline which, from time to time, may be agreed upon and adopted by the ministers and preachers of the said church at their general conference in the United States of America." This is the main purpose of the trust, the other portions of the deed relating to the use being ancillary only to this principal object. The interjected words, "so long as they use it for that purpose, and no longer, and then to return back to the original owner," are terms of undoubted limitation, and not of condition. They accompany the creation of the estate, qualify it, and prescribe the bounds beyond which it shall not endure.

The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed, and no longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation, and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or determinate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of a condition to be annexed.

"A special limitation," says Mr. Smith in his work on Executory Interests (page 12), "is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry or claim, before it would, or might, otherwise expire by force of, or according to, the general limitation." A special limitation may be created by the words "until," "so long," "whilst" and "during," as when land is granted to one so long as he is parson of Dale, or while he continues unmarried, or until out of the rents he shall have made £500. 2 Bl. Comm. 155; Smith, Ex. Int. 12; 2 Coke, 12P-121; Fearn, Rem. 12, 13, note, p. 10. "In such case," says Blackstone, "the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy."

The effect of the limitation in this case was that the estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion *ipso facto* returned to Thomas Pillow, the grantor. The abandonment of the house as a place of worship, therefore, became a chief question in the cause, because the title of the trustees to the property,

and consequently their right to maintain this action, hinged upon this event. Then, as the use of the members of this church was to be according to the rules and discipline from time to time adopted by the general conference, it became a question whether the alleged abandonment of the house as a place of worship was by church authority, and, according to the rules and discipline then existing; for a mere temporary suspension of services there, or a discontinuance of the use without authority, would not *ipso facto* determine the use. Hence an inquiry both into the fact of abandonment and the authority of the church became essential.

Judgment affirmed.

## CHAPTER XI.

### FUTURE ESTATES AND INTERESTS.

#### Buckler v. Hardy.

Decision by Court of Queen's Bench, 1597.

(Reported in *Cro. Eliz.* 585.)

*Ejectione Firmæ.* Upon a special verdict the case was, Andrew Buckler being tenant for life, the remainder to Christopher Buckler in tail remainder to the right heirs of the said Andrew, lets the land to J. S. for four years, and afterwards granted the reversion to one Row, *habendum* from midsummer next for the life of the said Andrew Buckler. After midsummer, J. S., the lessee, attorned to Row, and after that granted all his term unto him. Row entered, and granted the land to Hardy, the defendant, to have and to hold to him for his life; but no livery was made. Hardy entered; and after the four years expired Hardy continued his possession. Andrew Buckler levied a fine to him *sur conusance de droit come ceo*, etc. Christopher Buckler, the tenant in tail, enters for a forfeiture, and lets it to the plaintiff for years, upon whom the defendant re-entered. *Et si*, etc.

The first question was, when this reversion was granted by Andrew Buckler to Row, *habendum* after midsummer, and the attornment to that grant is after midsummer, whether it be a good or void grant. And all the justices agreed that the grant was void, being limited to begin at a day to come; for if it should be good, the lessor should have a particular estate reserved in himself in the meantime, which cannot be. So if the attornment had been made thereto presently, yet it had been clearly ill. And although the attornment was not until after midsummer, yet it cannot help the grant, which was void at the beginning; for *quod ab initio non valet, in tractu temporis convalescere non*

*potes*; as if a man makes a lease for years, and before the lessee's entry he grants the reversion, and afterwards the lessee enters and attorns, yet it is void; because he had not at that time a reversion to grant. So in Trevillian's Case one devised his land before the statute of wills and afterwards the statute was made and the devisor died, yet this will is void; but if a man grants a reversion, *habendum* after the death of the tenant for life, it is good, for it is but a limitation when he shall have the possession; but, if it were *habendum* after the death of a stranger, it should be otherwise. Popham said it had been ruled where a feoffment was made *habendum* after Michaelmas and the attorney made livery after Michaelmas, yet it was void.

Secondly. Admitting the reversion passed not to Row, when he afterwards purchased the term, and granted the land to Hardy for his life (no livery being made), whether the land passed by that grant. And Gawdy, Fenner and Popham held that the term passed; for (10 Eliz.) Dyer, 277, is where a termor for years devised the land to one for his life, that the term passed. So here. But Popham said if there had been in the deed a letter of attorney to make livery, then peradventure it would have been otherwise, for thereby the purpose of the grantor had appeared to pass a freehold and not the term only; but here is no more than the grant of his term during his life.

Thirdly. Admitting he had the term or not by this grant, whether, after the term expired, he continuing the possession shall he said to be tenant at sufferance. And if he hath not the term, whether, by his entry, he be a disseisor. And then when Andrew Buckler levied a fine unto him *sur conusance de droit come ceo*, etc., it is a forfeiture every way; for the conusor and the conusee are both estopped to say that he had not any estate before the fine by the gift of the conusor. Wherefore it is a manifest forfeiture; and so the entry of Charles Buckler, tenant in tail, is congeable. Wherefore it was adjudged for the plaintiff. See same case in the common pleas, Cro. Eliz. 450, 2 Cooke, 55, and Moore, 423.

### Morse v. Proper.

Decision by the Supreme Court of Georgia, January 21, 1839. Opinion by Simmons, J.

(Reported in 82 Ga. 13.)

On the 12th of January, 1855, L. S. Morse executed a deed conveying certain real and personal property to his step-mother, Mrs. Anna Morse for and during her natural life; the *habendum* and *tenendum* clause of the will being as follows: "The said Anna Morse to have and to hold said house and lot, and said negroes and their increase, during her natural life, for her sole and separate use and benefit, free from the debts and liabilities of her husband, the said Oliver Morse, either heretofore made

or hereafter contracted; and after the death of the said Anna Morse I give said property, real and personal, and its increase, to such of the children of the said Anna Morse by her present husband as may be living at her death, and the representatives of such as may be dead, in fee, the representative to take the share their deceased parent would have been entitled to had he or she been alive; but if the said Anna Morse should die without child or children, or the representative of either, then the whole of the above-named property, with the increase, I give unto the said Oliver Morse in fee simple." The deed appointed Oliver Morse trustee, with power to sell and reinvest for the purposes set forth. Oliver and Anna Morse had, at the time of the execution of this deed, a son, Daniel Morse, who was born on the 1st of January, 1854, and died on the 18th of July, 1868, and at his death was the only child, and none other was born to them. Daniel died without issue, and before his father. The trustee sold the property conveyed by the deed, and reinvested the proceeds in real estate, taking deeds thereto in his name as trustee; and at his death he had on hand a certain dwelling-house and a store-house and fifty acres of land. After the death of Daniel Morse, the child, on the 18th of July, 1868, Oliver Morse, on the 5th of August, 1868, made a will by which he bequeathed to his wife, Anna Morse, "all and every interest, claim or title, either present or in expectancy, and all my real estate that I own individually or as trustee for her." Oliver Morse died in a few days after making this will. Anna Morse lived until the 18th of November, 1887, when she died, leaving no child or children, or representative of child or children, and leaving a will in which she bequeathed all her property of every character to her sister, Mrs. Sarah Proper, and making Mrs. Proper her executrix. Mrs. Proper undertook to carry out the will, and to administer upon the property above described; and L. S. Morse, the grantor in the deed to Mrs. Anna Morse, filed a bill claiming that the property constituted no part of Anna Morse's estate, and that his father had no right to transmit the remainder interest to his wife by will or deed; that the remainder interest was "gone forever," and the property reverted to him, the original grantor; and that Anna Morse had no right to convey said property in her will to her sister Mrs. Proper. He prayed an injunction restraining Mrs. Proper, the executrix, from interfering with his rights touching the property, and from exercising control or management over it; and prayed for the appointment of a receiver, etc. The defendant answered the bill, and claimed the absolute title to the property in dispute under her sister's will. She insisted in her answer that Oliver Morse had such an interest as he could dispose of by will, and that he devised it to his wife, Anna, and that Anna devised it to her, and that her title to and ownership of the property were absolute. The chancellor refused the injunction prayed for by L. S. Morse, and the complainant excepted.

The question for decision in this case is whether Oliver Morse had such an interest in this property, at the time of his death in 1868, as he could transmit by will to his wife. If he did have such a devisable interest, having devised it to his wife, and his wife having devised it to her sister (the defendant in error here), the chancellor was right in refusing the injunction. It will be remembered that the deed from L. S. Morse to Anna Morse gave her this property for and during her natural life, and after her death it was to go to her children or the representatives of the children; and, in case she died leaving no children or representatives of children, the property was to go to Oliver Morse in fee. In our opinion, Oliver Morse, under this deed, took a remainder interest in this property. Was it a vested or a contingent remainder? The plaintiff in error contended that it was a contingent remainder, and that the contingency was as to the person, and therefore Oliver Morse, under section 2266 of the code, had no such interest in the property as he could devise to his wife. Counsel for the defendant in error contended that Oliver took a vested remainder under the deed made in 1855, but that, if it was a contingent remainder, the contingency was as to the happening of an event, and not as to the person and therefore he had a right to devise it.

This case was ably argued on both sides, and we have given it a great deal of consideration, and we think that Oliver Morse had such an interest in this property as he could devise to his wife; and that therefore the chancellor was right in refusing the injunction. We think that under the deed he took a contingent remainder, and the contingency was as to the event, and not as to the person. The language of the code on this subject is as follows: "Section 2265. Remainders are either vested or contingent. A vested remainder is one limited to a certain person, at a certain time, or upon the happening of a necessary event. A contingent remainder is one limited to an uncertain person, or upon an event which may or may not happen. Sec. 2266. If the remainder-man dies before the time arrives for possessing his estate in remainder, his heirs are entitled to a vested remainder interest, and to a contingent remainder interest when the contingency is not as to the person, but as to the event." The deed in this case declares that "if the said Anna Morse should die without child or children, or the representative of either, then the whole of the above-named property, with the increase, I give unto the said Oliver Morse in fee simple." We think the contingency depended on the event of Anna Morse dying without children, or the representative of children. The deed means, in our opinion, that in that event, or in that case, or when that particular thing should happen, Oliver Morse should take the property in fee. There was no uncertainty as to who should take if there were no children, or representative of children, living at the time of her death. The person to take in that event was certain, and was fixed by deed.

In case there were no children, or representatives of children, living at the time of Anna's death, the deed points unerringly to the person who would take, and declares that he should take in fee simple, which, under our law, means not only himself, but his heirs and assigns. If the deed had said that in case Mrs. Morse died without children, or representative of children, then to the heirs or right heirs of Oliver Morse, the person to take in that event would have been uncertain; or if it had said, in case of Mrs. Morse dying without children, or representative of children, to the heirs of John Smith, the person to take would have been uncertain; but, as we have said before, the deed does not leave it uncertain who is to take in the event she died without children, or representative of children. It seems that in that case Oliver Morse is to take in fee simple. Oliver Morse having a contingent remainder interest in this property, did he have a right to dispose of it by will to his wife? We think he did. The old doctrine was that contingent remainders were not devisable by the person entitled thereto; but that doctrine was abandoned many years ago, and it is now held almost universally that a contingent remainder is devisable where the contingency is not as to the person, but as to the event. Indeed, that is the principle announced in our code, section 2266. That section declares that, if the remainderman dies before the time arrives for the possessing his estate, his heirs are entitled to a contingent interest, when the contingency is not as to the person, but as to the event. If the contingency be as to the person, and that person be not *in esse* at the time when the contingency happens, his heirs are not entitled. It is contended by counsel for the plaintiff in error that the latter part of this section controls the case; but we think that we have shown that the contingency was not as to the person, but as to the event, and therefore the latter part of the section does not apply to this case. Counsel for the defendant in error cited the case of *Loring v. Arnold*, 15 R. I. 428, 8 Atl. R. 335, the facts of which case, we think, are exactly the same as in the case now under consideration. In that case it appears that Thomas Whipple died in 1843, leaving a will by which he devised certain real estate to his son James, "for and during his natural life, and at his decease, if he should leave any lawful child or children, then to them, their heirs and assigns, forever; but, if he should die without leaving any lawful child or children, then my will is that the same shall descend and be divided equally among his brother T., his sisters G., M., S., A. and J. A. B. to them, their heirs and assigns forever." J. A. B. died in Illinois, in 1881, leaving by will all her estate in Rhode Island to C. E. B. James died in 1885, leaving no wife or children; and it was held that J. A. B. had a contingent remainder, and that, although this contingency was not determined until after the death of J. A. B., yet, the person who was to take being certain, the interest was descendible and devisable. So, also, in 2 Shars. & B. Lead. Cas. Real Prop. 374; *Buzby's Appeal*, 61 Pa.

St. 111; Chess' Appeal, 87 Pa. St. 362; Fearn, Rem. (7th ed.) 364, 365; 4 Kent, Comm. 264; 2 Washb. Real Prop. 522. The case of Jackson v. Waldron, 13 Wend. 178, relied on so strongly by the plaintiff in error, was overruled in the case of Miller v. Emans, 19 N. Y. 384. The decision in the case of Moorhouse v. Wainhouse, decided in 1767, and reported in 1 W. Bl. 638, also relied on by the plaintiff in error, was put upon the peculiar circumstances of that case, and the facts of that case are different from the facts in this. Judgment affirmed.

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## CHAPTER XII.

### REMAINDERS, VESTED AND CONTINGENT.

#### Chapin et al. v. Crow.

Decision by Supreme Court of Illinois, October 27, 1893. Opinion by Shope, J.

(*Reported in 147 Ill. 219.*)

STATEMENT OF FACTS.—This was a bill for specific performance, filed April 21, 1892, by Alice J. Crow against appellants, in which it is alleged that complainant sold to appellants, and they agreed to purchase, at the price of \$8,250, certain lands. The contract of sale was reduced to writing, signed by the parties, which recited that \$500 of the consideration had been paid as earnest money, and appellants contracted to pay the further sum of \$7,750 upon the making of a good and sufficient deed conveying to them "a good and merchantable title to said premises." It is stipulated that the vendor shall convey a good and merchantable title, subject to certain leases, etc., and shall furnish an abstract brought down to date, showing such title. It is then provided that the purchaser, within ten days after receiving the abstract, shall deliver a note or memorandum of objections to the title, if any, etc.; and, if material objections are found, not cured within thirty days after notice, the contract to be void, at the option of the purchaser, etc. The cause was heard on bill, answer and proofs, and a decree entered according to the prayer of the bill.

OPINION.—The question presented is whether, by the deed to the Warringtons, the sons took a vested estate in remainder after the death of their father. If they did, it is conceded appellee had a merchantable title, and the decree was properly entered. The three—Henry, George and James Warrington—joined in a warranty deed to appellee's grantor, and the question is whether that conveyed a perfect title. The deed calling for construction was made by Horatio L. Wait and wife to



Henry Warrington, George Warrington and James Warrington, parties of the second part, and purported to convey the premises in question to the "said Henry Warrington and his assigns for and during the natural life of the said Henry Warrington; and upon his death, then unto his sons, the said George Warrington and James Warrington, of the second part, to their heirs and assigns, forever, in equal parts if they shall both survive the said Henry Warrington; but, if either of said sons shall die without issue him surviving, then the survivor shall take all the said property hereby conveyed; but, if one of said sons shall die leaving issue, then one moiety to the survivor and the other moiety in equal parts to the children of the deceased." *Habendum*: "To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, in conformity with and in pursuance of the conditions of the aforementioned grant."

It will not be necessary in this case to discuss at length the doctrine of remainders, however interesting that may be. It should, however, be remarked that the rule is well established that contingent remainders are not favored, and unless, from the language of the instrument, it is manifest that a contrary result was intended, the estate will be regarded as vested, and not contingent. It is, however, equally well settled that effect must be given to the language employed, and, if an estate upon contingency is created, it must be so declared. "Vested remainder (or remainder executed, whereby a present interest passes to the party, although to be enjoyed *in futuro*) is where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent." 2 Bl. Comm. 168. Or, as said by Kent (4 Comm. 202): "A remainder is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. . . . A vested remainder is an estate to take effect in possession after a particular estate is spent." For, though it may be uncertain whether a remainder will ever take effect in possession, it will nevertheless be a vested remainder if the interest is fixed. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. In cases of vested remainders a present interest passes to a determinate and fixed person or class of persons, to be enjoyed in the future. "Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event; so that the particular estate may chance to be determined and the remainder never take effect." 2 Bl. Comm. 169. "It is," says Mr. Preston (page 74), "not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between an interest which is vested and one which is contingent. It is in one case the certainty and fixed right of having the enjoyment at the time when

the possession shall fall, and in the other case the uncertainty of having this right at that time, which are universally the characteristics and distinguishing features; the former instance of a vested estate, and in the latter instance an interest in contingency." Thus, it is said by Blackstone (2 Comm. 170): "A remainder may be also contingent where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain; as, where land is given to A. for life, and, in case B. survives him, then with remainder to B. in fee. Here B. is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event,—the uncertainty of his surviving A. During the joint lives of A. and B. it is contingent; and, if B. dies first, it never can vest in his heirs, but is forever gone. If A. dies first, the remainder to B. becomes vested." Fearn, Rem., p. 1. In *Smith v. West*, 103 Ill. 332, this court quoted with approval from *Hawley v. James*, 5 Paige, 466, as follows: "Where the remainderman's right to an estate in possession cannot be defeated by third persons, or contingent events, or by a failure of a condition precedent, if he lives, and the estate limited to him by way of remainder continues till the precedent estates are determined, his remainder is vested in interest,"—and from *Moore v. Littel*, 41 N. Y. 72, that "decisions and text-writers agree that by the common law remainder is vested where there is a person in being who has a present capacity to take in remainder, if the particular estate be then presently determined; otherwise the remainder is contingent. . . . The person must be one to whose competency to take no further or other condition attaches, etc., i. e., in respect to whom it is not necessary that any event shall occur or condition be satisfied, save only that the precedent estate shall determine." *Olney v. Hull*, 21 Pick. 311; *Thompson v. Ludington*, 104 Mass. 193; *Hull v. Beals*, 23 Ind. 25; *Dingley v. Dingley*, 5 Mass. 537; *Schofield v. Olcott*, 120 Ill. 362, 11 N. E. R. 351.

In this case, that a life estate was vested in Henry Warrington is unquestioned. The grant is to Henry Warrington and assigns, for and during his natural life; and upon his death, then unto his sons, the said George Warrington and James Warrington, of the second part, in equal parts. If the grant to the sons had stopped here there could have been no question that the estate vested in the sons as tenants in common. Such would have been the effect without the words, "in equal parts." These words, "in equal parts," are to be read with the succeeding words, "if they shall both survive the said Henry Warrington." There can be no question about the intent thus far. But these words are followed by the clause: "But if either of said sons shall die without issue him surviving, then the survivor shall take all of said property hereby conveyed." That is, the intention expressed is, they shall take in equal parts if they both survive the life tenant, but, if one die without surviving issue, the other shall take the whole; thus attempting, upon the

contingency of one dying during the continuance of the life estate, without issue surviving him, to cast the whole estate upon the survivor. It is unnecessary to determine whether, if the granting clause had ended with this provision, the estate would have vested in the two subject to be divested as to one who should die during the life estate without surviving issue or not. In our opinion, the remaining portion of the granting clause clearly indicates an intention that, upon the contingency that one of the sons shall die before the termination of the life estate, leaving issue him surviving, the estate of the decedent shall go to his children. As we have seen, after granting to the sons and their heirs and assigns in remainder in equal parts if they shall both survive the life tenant, but, if either should die without issue surviving before the falling in of the precedent estate, then the survivor should take the whole, there is the further condition: "But if one of said sons shall die leaving issue, then one moiety to the survivor and the other moiety in equal parts to the children of the deceased." It is clear that by the words "if one of said sons shall die leaving issue" was meant if the sons shall die leaving issue before the vesting of the estate in possession,—that is, before the termination of the intermediate estate,—then, and in that event, the moiety that would have vested in him had he lived is granted to his children.

The term "children," in its natural sense, is a word of purchase and will be taken to have been so used, unless so controlled and limited by other expressions in the instrument as to show that it was intended as a word of limitation. We need not extend this opinion by a discussion of this proposition; it will be found to be well established. In *re Sanders*, 4 Paige, 293; *Baker v. Scott*, 62 Ill. 86; *Beacroft v. Strawn*, 67 Ill. 28; *Rogers v. Rogers*, 3 Wend. 503. Not only are there no words tending to show that the word "children" was here used as meaning heirs generally, but it is clearly shown to have meant the issue of the son dying. Upon the contingency, therefore, of one of the sons dying before the falling in of the life estate, leaving children surviving him, such children would take, not as heirs of the son dying, but as grantees in the deed,—as purchasers. *Ebey v. Adams*, 135 Ill. 80, 25 N. E. R. 1013, and cases cited. This being so, it is apparent that it was not fixed and determined by the deed who should take absolutely at the termination of the precedent estate. If the sons survive the father, the estate would be vested in them, both in interest and possession. If one of them died, leaving children him surviving, the estate would, upon the termination of the life estate, vest in the survivor of the two sons and the children of the deceased son. If the limitation had been to the sons, and, if they died before the life estate terminated, then to a stranger, no question could have been made that the estate was contingent upon their surviving until the expiration of the intermediate estate. Precisely the same occurs here. The grant is to the sons, if

alive when the estate terminates; if not, to their children surviving them as a class. It cannot be known until the death of the life tenant whether the contingency upon which the sons are to take will exist. Nor can it be known whether the children of either one of them will take, as that will depend upon the contingency of issue being born, the death of the sons, and the children surviving them. Nor need we determine here what would be the result if both sons should die during the continuance of the particular estate, with or without issue. It is clear, we think, that the estate in the sons James and George Warrington, was contingent upon their surviving the life tenant; or, if one of them should die, and not the other, that the deceased son should have died without issue him surviving. It follows necessarily that we are of opinion the deed from the Warringtons to Smith, and from Smith to appellee, did not convey a good and merchantable title, and the decree ordering specific performance of the agreement of purchase and sale was therefore erroneously entered. It will accordingly be reversed, and the bill dismissed.

### Hardage et al. v. Stroope.

Decision by Supreme Court of Arkansas, December 23, 1893. Opinion by Battle, J.

*(Reported in 58 Ark. 303.)*

J. L. Stroope and wife conveyed the land in controversy to Tennessee M. Carroll, "to have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this state." After this, Mrs. Carroll conveyed it in trust to James M. Hardage to secure the payment of a debt. She had two children born to her after the conveyance by J. L. Stroope and wife, but they died in her life-time. She died leaving no heirs of her body, but left her father, W. S. Stroope, surviving. After her death the land was sold under the deed of trust, and was purchased by Joseph A. Hardage. W. S. Stroope, the appellee, now claims it as the heir of Mrs. Carroll, and Joseph A. Hardage, the appellant, claims it under his purchase.

The rights of the parties depend on the legal effect of the following words contained in the deed to Mrs. Carroll: "To have and to hold the said land unto the said Tennessee M. Carroll for and during her natural life, and then to the heirs of her body, in fee simple; and if, at her death, there are no heirs of her body to take the said land, then in that case to be divided and distributed according to the laws for descent and distribution in this state." Appellee contends that Mrs. Carroll

only took a life estate in the land under this clause, and that he is entitled to the remainder, she having left no descendants. On the other hand, the appellant contends that the remainder in fee vested in the children, and, when they died, Mrs. Carroll inherited it, and the whole estate in the land became vested in her; and that, if this contention be not true, the deed to Mrs. Carroll comes within the rule in Shelley's Case, and vested in her the estate in fee simple; and that in either event he is entitled to the land.

It is obvious that the deed to Mrs. Carroll created in her no estate in tail. Her grantor reserved no estate or interest, nor granted any remainder, after a certain line of heirs shall become extinct, but conveyed the land to her to hold during her life, and then to the heirs of her body in fee simple. No remainder vested in her children. It was to be inherited by the heirs of her body, and they were her descendants who survived her and were capable of inheriting at the time of her death. They might have been grandchildren. They were not the children, as they died in the life-time of the mother.

The effect of the deed, as explained by the *habendum*, in the absence of the rule in Shelley's Case, was to convey the land to Mrs. Carroll for her life, and then to her lineal heirs, and, in default thereof, to her collateral heirs. As there can be no collateral heirs only in the absence of the lineal, the deed conveyed the land to Mrs. Carroll, in legal phraseology, for her life, and after her death to her heirs.

Two questions now confront us: (1) Does the rule in Shelley's Case obtain in this state? (2) And, if so, does the deed in question fall within it?

1. Is it in force in this state?

Section 566 of Mansfield's Digest provides: "The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First that are applicable to our own form of government, of a general nature and not local to that kingdom, and not inconsistent with the constitution and laws of the United States or the constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the general assembly of this state."

The rule in Shelley's Case, as stated by Mr. Preston, which Chancellor Kent says is full and accurate, is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, or of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." Its origin is enveloped in the mists of antiquity. It was laid

down in Shelley's Case in the twenty-third year of the reign of Queen Elizabeth, upon the authority of a number of cases in the year books. Sir William Blackstone, in his opinion in *Perrin v. Blake*, 1 W. Bl. 672, cites a case in 18 Edw. II. as establishing the same rule. The earliest intelligible case on the subject, however, is that of Provost of Beverly, 3 Y. B. 9, which arose in the reign of Edward III., and substantially declared the rule as laid down in Shelley's Case.

Various reasons have been assigned for the origin of the rule. Chancellor Kent, upon this subject, says: "The judges in *Perrin v. Blake* *supra*, imputed the origin of it to principles and policy deduced from feudal tenure, and that opinion has been generally followed in all the succeeding discussions. The feudal policy undoubtedly favored descents as much as possible. There were feudal burdens which attached to the heir when he took as heir by descent, from which he would have been exempted if he took the estate in the character of a purchaser. An estate of freehold in the ancestor attracted to him the estate imported by the limitation to his heirs; and it was deemed a fraud upon the feudal fruits and incidents of wardship, marriage and relief to give the property to the ancestor for his life only, and yet extend the enjoyment of it to his heirs, so as to enable them to take as purchasers, in the same manner and to the same extent, precisely, as if they took by hereditary succession. The policy of the law will not permit this, and it accordingly gave the whole estate to the ancestor, so as to make it descendible from him in the regular line of descent. Mr. Justice Blackstone, in his argument in the exchequer chamber in *Perrin v. Blake*, does not admit that the rule took its rise merely from feudal principles, and he says he never met with a trace of any such suggestion in any feudal writer. He imputes its origin, growth and establishment to the aversion that the common law had to the inheritance being in abeyance; and it was always deemed by the ancient law to be in abeyance during the pendency of a contingent remainder in fee or in tail. Another foundation of the rule, as he observes, was the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor, and thereby giving him the power of disposition. Mr. Hargrave, in his observations concerning the rule in Shelley's Case, considers the principle of it to rest on very enlarged foundations; and, though one object of it might be to prevent frauds upon the feudal law, another and a greater one was to preserve the marked distinctions between descent and purchase, and prevent title by descent from being stripped of its proper incidents, and disguised with the qualities and properties of a purchase. It would, by that invention, become a compound of descent and purchase,—an amphibious species of inheritance,—or a freehold with a perpetual succession to heirs, without the other properties of inheritance. In *Doe v. Laming*, 2 Burrows, 1100, Lord Mansfield con-

sidered the maxim to have been originally introduced, not only to save to the lord the fruits of his tenure, but likewise for the sake of specialty creditors. Had the limitation been construed a contingent remainder, the ancestor might have destroyed it for his own benefit; and, if he did not, the lord would have lost the fruits of his tenure, and the specialty creditors their debts."

But, whatever may have been the cause of its origin, its effect has been "to facilitate the alienation" of land "by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." Its operation in this respect has commended it to the favorable consideration of the most learned and able men of Great Britain and the United States, and doubtless contributes to its preservation and continuance, and enabled it to survive the innovation of legislation and the changes and fluctuations of centuries. Based upon the broad principles of public policy and commercial convenience, which abhor the locking up and rendering inalienable any class of property, it has ever been in harmony with the genius of the institutions of our country, and with the liberal and commercial spirit of the age. Hence, it has been recognized and enforced as a part of the common law of nearly every state where it has not been repealed by statute. *Starnes v. Hill* (N. C.), 16 S. E. R. 1011; *Baker v. Scott*, 62 Ill. 88; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. R. 814; *Doebler's Appeal*, 64 Pa. St. 9; *Kleppner v. Laverty*, 70 Pa. St. 72; *Polk v. Faris*, 9 Yerg. 209; *Crockett v. Robinson*, 46 N. H. 454; 4 Kent, Comm., marg. pp. 229-233; 2 Washb. Real Prop. (5th ed.), pp. 655-657.

The rule has never been changed in this state except in one respect,—estates tail have been abolished. Section 643 of Mansfield's Digest provides that, whenever any one would become seized at common law "in fee tail of any lands or tenements by virtue of a devise, gift, grant or other conveyance, such person, instead of being or becoming seized thereof in fee tail, shall be adjudged to be and become seized thereof for his natural life only, and the remainder shall pass in fee-simple absolute to the person to whom the estate tail would first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance." To this extent it has been repealed; in other respects it remains in full force in this state; and it was so held in *Patty v. Goolsby*, 51 Ark. 71, 9 S. W. R. 846.

## 2. Does this case come within the rule?

"Whenever there is a limitation to a man which, if it stood alone, would convey to him a particular estate of freehold, followed by a limitation to his heirs . . . (or equivalent expressions) either immediately, or after the interposition of one or more particular estates, the apparent gift to the heirs, . . ." according to the rule in *Shelley's Case*, "is to be construed as a limitation of the estate of the ancestor, and not as a gift to his heirs." The theory was that, in cases

which come within the rule, the heirs take by descent from the ancestor, and they cannot do so unless "the whole estate is united, and vests as an executed estate of inheritance in the ancestor." This theory was based upon the fact that "the ancestor was the sole ascertained and original attracting object,—the groundwork of the grantor's or testator's bounty,"—and upon the presumption, arising from the fact, that the grantor or testator, as the case may be, "meant the person who should take after the ancestor should be any person indiscriminately who should answer the description of heirs . . . of the ancestor, and be entitled only in respect to such description," and that the estate devised or conveyed should vest in them in that character only. "In order to effectuate this intent, and secure the succession to its intended objects," the rule rejects, as inconsistent and incompatible with this primary or paramount intent, "any other intent than that the ancestor should take an estate for life only, and the heirs should take by purchase," and vests the estate of inheritance in the ancestor. This was considered necessary to accomplish the primary object of the grantor or ancestor. 2 Fearn, Rem., pp. 216-220.

"Hargrave has justly observed," says Fearn on Remainders, "that the rule cannot be treated as a medium for discovering the testator's intention, but that the ordinary rules for the interpretation of deeds should be first resorted to; and that, when it is once settled that the donor or testator has used words of inheritance according to their legal import,—has applied them intentionally to comprise the whole line of heirs to the tenant for life, has made him the terminus by reference to whom the succession is to be regulated,—then the rule applies. But the rule is a means for effectuating the testator's primary and paramount intention, when previously discovered by the ordinary rules of interpretation,—a means of accomplishing that intention to comprise, by the use of the word 'heirs,' the whole line of heirs to the tenant for life, and to make him the terminus, by reference to whom the succession is to be regulated; and the way in which the rule operates, as a means of doing this, is by construing the word 'heirs' as a word of limitation, or, in other words, by construing the limitation to the heirs, general or special, as if it were a limitation to the ancestor himself and his heirs, general or special." 2 Fearn, Rem., p. 221.

In Doeblor's Appeal, 64 Pa. St. 9, Judge Sharswood, in discussing the rule in Shelley's Case, said: "If the intention is ascertained that the heirs are to take *qua* heirs, they must take by descent, and the inheritance vest in the ancestor." The rule in Shelley's Case is never a means of discovering the intention. It is applicable only after that has been discovered. It is then an unbending rule of law, originally springing from the principle of the feudal system; and, though the original reason of it—the preservation of the rights of the lord to his relief, primer seisin, wardship and marriage—has passed away, it is still maintained as a



part of the system of real property which is based on feudalism, and as a rule of policy. It declares inexorably that, where the ancestor takes a preceding freehold by the same instrument, a remainder shall not be limited to the heirs, *qua* heirs, as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed inheritance in the ancestor; if immediately after some other interposed estate, then it shall vest in him as a remainder. Wherever this is so it is not possible for the testator to prevent this legal consequence by any declaration, no matter how plain, of a contrary intention. This is a subordinate intent which is inconsistent with, and must therefore be sacrificed to, the paramount one. Even if he expressly provides that the rule shall not apply that the ancestor shall be tenant for life only, and impeachable for waste, if he interpose an estate in trustees to support contingent remainders, or, as in this will, declare in so many words that he shall in no wise sell or alienate, as it is intended that he shall have a life interest only, it will be all ineffectual to prevent the operation of the rule. No one can create what is in the intendment of the law an estate in fee, and deprive the tenant of those essential rights and privileges which the law annexes to it. He cannot make a new estate unknown to the law."

"The policy of the rule," says Chancellor Kent, "was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of that person purchasers." 4 Kent, Comm. 216.

At common law the word "heirs" was necessary to convey a fee simple by deed. No equivalent words would answer the purpose. If the conveyance was not made to a man and his heirs, the grantee only took a life estate, notwithstanding the estate was limited by such phrases as "to A. forever," or "to A. and his successors," and the like. An express direction that the grantee should have the fee simple in the land would not have supplied the place of the word "heirs." But in this state the question as to what estate a deed to land conveys is determined by the intent of the parties, as ascertained from the contents of the deed and the power of the grantor to convey. When construed in this manner, it is obvious that the intention of the deed in question was to convey the land in controversy to Mrs. Carroll for life, then to her lineal heirs, and, in default thereof, to her collateral heirs; in other words, to Mrs. Carroll for life, and, after her decease, to her heirs. The intention that the heirs were to take only in the capacity of heirs is manifest. The deed comes within the rule in Shelley's Case. The estate of inheritance vested in Mrs. Carroll, and she became seised of the land in fee simple. 2 Washb. Real Prop. (5th ed.), p. 653.

"As a consequence from the foregoing principles, whoever has a free hold which, by the terms of the limitation, is to go to his heirs, may

alien the estate, subject only to such limitation as may have been created between his freehold and the inheritance limited to his heirs." 2 Washb. Real Prop. 651.

It follows, then, that Mrs. Carroll had the right to convey the fee in the land in trust to secure the payment of her debts, and that a sale of such estate under the deed, and in conformity with law, was valid.

The decree of the court below is reversed, and the cause is remanded for proceedings consistent with this opinion.

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## CHAPTER XIII.

### ESTATES IN EQUITY.

#### Witham v. Brooner.

Decision by Supreme Court of Illinois, January Term, 1872. Opinion by Thornton, J.

(Reported in 63 Ill. 344.)

The refusal to admit in evidence the deed to Hallowbush is the only error assigned.

The deed was executed to Hallowbush "in trust for White and Smith." The trustee had no trusts to execute—no duties to perform. He was a mere naked trustee.

One of the *cestuis que trust* had executed a deed to the same land to the plaintiff below, under which he claimed title.

In whom was the legal estate, by operation of the deed to Hallowbush—the trustee or the *cestuis que trust*?

Our statute is a substantial re-enactment of the twenty-seventh statute of Henry VIII., usually termed the "Statute of Uses." Leaving out some of the verbiage, it enacts that when any person shall be seized of any lands, to the use, confidence or trust of any other person, by any bargain, sale, agreement or otherwise, in such case all persons that have such use or trust in fee simple shall be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same land, to all intents, in law, as they shall have in the use or trust of and in the same. R. S. 1845, p. 103, § 3.

The clear and positive language of the statute, aided by the first section of the same act, unmistakably determines the question. The person having the use shall be adjudged to be in lawful seizin, estate and possession. No language could more aptly stamp the character of the title.

Livery of seizin is abolished by the first section of the conveyance act, and the title is thereby absolutely vested in the donee, grantee,

bargainee, etc., independently of the statute of uses. Hence, under this statute, a deed in the form of a bargain and sale must be regarded as having the force and effect of a feoffment; and under the statute of uses, a feoffment to A., for the use of or in trust for B., would pass the legal title to B. In a deed purely of bargain and sale, independently of the first section of the conveyance act, the rule would be different, and the title would vest in the bargainee. Without the first section, the legal title would be in the trustee, in this case; but as the trust was a passive one, the deed operated as a feoffment would at common law, and vested the legal title in the *cestuis que trust*, by virtue of the statute of uses. Thus the statute executes itself. It conveys the possession to the use, and transfers the use to the possession; and by force of the statute the *cestuis que trust* had the lawful seizin, estate and possession.

The three things necessary to bring this estate within the operation of the statute did concur. There was a person seized to a use; a *cestui que use*; and a use *in esse*. The use was then executed, and the statute operated. There was nothing in the deed to prevent the execution of the use. There was nothing to be done by the trustee to make it necessary that he should have the legal estate. There was to be no payment of rents and profits to another, or debts, or taxes. The statute operated instantly and vested the legal estate in the *cestuis que trustent*.

All the authorities sustain this view.

Blackstone says that previous to the enactment of twenty-seventh Henry VIII., abundance of statutes had been provided which tended to consider the *cestui que use* as the real owner, and that this idea was carried into full effect by the twenty-seventh Henry VIII., called, in conveyances and pleadings, the "Statute for Transferring Uses into Possession;" that the statute annihilated the intervening estate of the feoffee, and changed the interest of the *cestui que use* into a legal instead of an equitable ownership; and that the legal estate never vests in the feoffee for a moment, but is instantaneously transferred to the *cestui que use*, as soon as the use is declared. Bl. Comm., bk. 2, pp. 332, 333.

Cruise, in his Digest of the Law of Real Property (1 Greenl. Ed., top page 313, § 34), says when the three circumstances concur, necessary to the execution of a use, "the possession and legal estate of the lands out of which the use was created are immediately taken from the feoffee to uses, and transferred, by the mere force of the statute, to the *cestui que use*. And the seizin and possession thus transferred is not a seizin and possession in law only, but are actual seizin and possession in fact — not a mere title to enter upon the land, but an actual estate." See, also, Smith, Real & Pers. Prop. 155; 1 Land Uses, 119; 2 Washb. Real Prop. (1st ed.) 120; 4 Kent, Comm. 288 et seq.; Webster v. Cooper, 14 How. 488; Barker v. Keat, 2 Mod. 250.

We are of opinion that the legal estate was in the *cestui que trust*, and that the rejected deed was admissible.

The cases referred to in this court are not in conflict with our conclusion.

The judgment is reversed and the cause remanded.

Judgment reversed.

### Jackson ex dem. White v. Cary.

Decision by Supreme Court of New York, May, 1819. Opinion by Spencer, C. J.

(Reported in 16 Johns. 302.)

This was an action of ejectment brought to recover an undivided eighth part of about six thousand acres of land in the county of Otsego. The cause was tried before Mr. J. Platt, at the Otsego circuit, in June, 1818.

The premises in question were part of a patent granted to George Croghan, and ninety-nine others, for one hundred thousand acres of land. The other proprietors released to Croghan, who, by deed dated March 2, 1770, conveyed the premises to Augustine Prevost; and Augustine Prevost and wife, by deed dated June 29, 1771, conveyed the same to Cornelius P. Low, who died about the year 1791, leaving the defendant his only child and heir at law.

The plaintiff founded his claim upon a deed dated the 20th of October, 1790, from Helena Kip, widow, and sole devisee of Henry Kip, deceased, and Henry H. Kip, to Richard Cary the elder, and the defendant Ann, his wife. This deed was expressed to be given for the consideration of £425, and granted to the parties of the second part (being in their possession by virtue of a bargain and sale bearing date the day before, and by force of the statute, etc.) a tract of six thousand acres formerly conveyed by G. Croghan to A. Prevost, and lately conveyed by the sheriff of Montgomery to Henry Kip, deceased, and Henry H. Kip, to have and to hold the same unto the said parties of the second part, their heirs and assigns, to the only proper use and behoof of the said parties of the second part, their heirs and assigns: "In trust, nevertheless, to and for the only proper use of the heirs of him, the said Richard Cary, party hereto, on the body of her the said Ann, the wife of the said Richard Cary, for ever, whether the same are already begotten or to be begotten; provided always, and this trust is upon this condition, nevertheless, that it shall and may be lawful to and for the said Richard Cary and Ann Cary to grant, bargain, sell, alien, release, and convey unto Edward Hurtin, of Stonington, in Connecticut, his heirs and assigns, a farm containing three hundred acres of land, etc., and also to let out in leases, renewable from time to time, or to grant, bargain, sell, alien, re-

lease, and convey in fee simple, by mortgage, or otherwise, to any person or persons, a quantity of the above released premises, not exceeding three hundred acres of land, including the aforesaid and described farm of three thousand acres of land, and out of such sale or sales to pay and retain to their own use the sum of £425, lawful money aforesaid, the consideration money above mentioned, paid by them out of their own proper money, and the interest thereof, together with all costs and charges as may arise or happen by reason or means of such sale or sales: and the overplus money to have and to hold in trust, to and for the use of their heirs, as before limited and expressed."

Richard Cary, the grantee, came on the premises as early as the year 1790 or 1791, and within one or two years afterwards removed his family there, and continued to occupy the premises until his death, which happened ten or twelve years before the trial, and the defendant has ever since remained in possession. Cary the elder, the grantee in the last mentioned deed, left Richard Cary the younger, and seven other children; and Richard Cary the younger, by deed dated the 14th of April, 1809, conveyed to the plaintiff's lessor and one Seelye all his right and interest, being one eighth part of the premises in question. In May, 1810, Seelye released all his interest to the lessor of the plaintiff.

A witness testified that both before and after the deed from R. Cary the younger he had many conversations with the defendant in relation to the interest, and the interest of her children in the premises, and in relation to the title; that in all these conversations the defendant never pretended that she had any other interest or title than what was given by the deed from Helena and Henry H. Kip; and that, by the legal construction of that deed, she supposed that she had a life estate in the premises and nothing more. The witness stated that the reason of his inquiring into the title to the premises was, that he had been engaged in negotiating a purchase of some of the rights of the children of R. Cary the elder in the property; that his conversations with the defendant were had in reference to the contemplated purchase, and that in all these conversations the defendant admitted the right of the children to sell, when of age, subject to the life estate, which she claimed under the deed from the Kips.

A verdict was found for the plaintiff, subject to the opinion of the court, on a case which was submitted to the court without argument.

The first objection to the deed from the Kips is, that it is a deed of bargain and sale, and that upon such a deed a use cannot be limited to any other person than the bargainee. This court adopted and recognized that principle in *Jackson v. Myers*, 3 Johns. 396. Sanders, in his *Treatise on Uses and Trusts*, gives this question a very full discussion. He says (page 315): "That the nature of the estate since the statute is the same as it was before; that the bargainee is still but a

*cestui que use*, and though he has a legal instead of a fiduciary estate since the statute, yet that legal estate is made such by force of the statute of uses, and not according to the rules of the common law. Upon this principle it has been held, and is now established, that no use can be limited to arise out of the estate of the bargainee to a third person, for that would be to limit a use to arise upon a use. Therefore, if A. bargains and sells in fee to C., to the use of A. (the bargainor), or to any other person, for life or in fee, this limitation to the use is void. But though this declaration of the use is void as a use, yet it has been a question whether it would not be supported as a trust, in chancery." And he apprehends it would be supported in that court. Shepherd, in his Touchstone (505-507), holds the same doctrine. He observes that if one seized of land in fee bargain and sell it or make a lease of it to another in trust, or for the benefit of a third person, this is but a chancery trust in this third person, as was clearly held in 8 Car. B. R.; and he proceeds to show that a fine, feoffment or recovery may be had of laud to the use and intent that either the parties thereto, or others, shall have it for any time or estate. Cruise (title 12, c. 2, §§ 11, 12, 24) confirms the positions of Shepherd and Sanders; and, indeed, there is no case to the contrary. This doctrine receives full and complete confirmation from the observations of Lord Hardwicke in Hopkins v. Hopkins, 1 Atk. 591.

The legal estate, therefore, was in Cary and wife, under the deed from the Kips; and it is the settled doctrine of this court that we look only to the legal estate in an action of ejectment, disregarding the equitable interest. 8 Johns. 488, and the cases there cited.

Mrs. Cary having survived her husband, and the estate granted to them being neither in joint tenancy nor tenancy in common, and so not affected by the statute, she, as survivor, takes the whole legal estate. This point was decided at the last term in Jackson v. Stevens, 16 Johns. 110.

Independently of these considerations the case shows that the defendant deduced a legal title to himself, as the heir of Cornelius P. Low, who, it was proved, acquired a complete title to the premises under the original patentee; and most certainly she was not concluded by the deed from the Kips from asserting her title. Without stopping, therefore, to inquire whether, under any circumstances, the lessor of the plaintiff could avail himself of that deed as an estoppel, which I am clearly of opinion he could not, the defendant never could be estopped by it, as she was a *feme covert* when it was given.

The evidence of declarations made by the defendant avail nothing, for although parol declarations of tenancy have been received, with certain qualifications, parol proof has never yet been admitted to destroy or take away a title. To allow parol evidence to have that effect would be introducing a new and most dangerous species of evidence.

The statute to prevent frauds and perjuries, which has been considered the Magna Charta of real property, avoids all estates created by parol, and all declarations of trust, excepting resulting trusts, regarding any lands, tenements or hereditaments. Yet, in defiance of this statute, we are asked to divest the defendant of what appears to be a complete title to the premises by her parol declarations. This cannot be listened to.

Judgment for the defendant.

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## CHAPTER XIV.

### EXECUTORY INTERESTS.

#### Wyman v. Brown et al.

Decision by Supreme Court of Maine, 1863. Opinion by Walton, J.

(Reported in 50 Me. 139.)

. . . Another question raised in this case is whether the deed from Mrs. Brown to Oliver S. Nay was valid. The objection to it is that it purports to convey a freehold estate to commence *in futuro*; and such is its effect, for by its terms Mrs. Brown was "to have quiet possession, and the entire income of the premises until her decease."

Deeds in which grantors have reserved to themselves estates for life are believed to be very common in this state; and whether or not such deeds are valid is certainly a very important question and ought to be authoritatively decided.

It was a principle of the old feudal law of England that there should always be a known owner of every freehold estate, and that the freehold should never, if possible, be in abeyance. This rule was established for two reasons: (1) That the superior lord might know on whom to call for the military services due from every freeholder, as otherwise the defense of the realm would be weakened. (2) That every stranger who claimed a right to any lands might know against whom to bring his suit for the recovery of them; as no real action could be brought against any one but the actual tenant of the freehold. Consequently, at common law, a freehold to commence *in futuro* could not be conveyed, because in that case the freehold would be in abeyance from the execution of the conveyance till the future estate of the grantee should vest. And it is laid down in unqualified terms in several cases in Massachusetts, and in one in this state, that an estate of freehold cannot be conveyed to commence *in futuro* by a deed of bargain and sale, which owes its validity to the statute of uses, and not to the common law.

But the doctrine that freehold estates to commence *in futuro* cannot be conveyed by deeds of bargain and sale, since the passage of the statute of 27 Hen. VIII., c. 10, commonly called the "Statute of Uses," is clearly erroneous. It is clear that, at common law, such conveyances could not be made; and it is equally clear that, by virtue of the statute of uses, such conveyances may be made. Prior to the reign of Henry VIII., real estate could be so held that one person would have the legal title, and another the right to the use and income. To obviate many supposed inconveniences which had grown out of this practice of separating the legal title from the use, the statute of uses was passed, by which it was enacted that the estates of the persons so seized to uses should be deemed to be in them that had the use, in such quality, manner, form and condition as they had before in the use. It will be noticed that the effect of this statute was to annex the legal title to the use, so that they could not be separated. Mr. Cruise says that, when this statute first became a subject of discussion in the courts of law, it was held by the judges that no uses should be executed that were limited against the rules of the common law; but that this doctrine was not and could not be adhered to, for the statute enacts that the legal estate or seizin shall be in them that have the use, in such quality, manner, form and condition as they before had in the use; that chancery having permitted uses to commence *in futuro* and to change from one person to another, by matter *ex post facto*, the courts of law were obliged to admit of limitations of this kind. The statute did not attempt to limit or control the doctrine of uses; it simply declared that where the use was, there the legal estate should be also. The result was that it opened several new modes of conveying legal estates wholly unknown to the common law; for whatever would convey the use and income of real estate before its passage, would, by virtue of the statute, convey the legal estate afterwards. It will thus be seen that conveyances through the medium of the statute of uses are effected in this way: The owner of an estate in lands, for a consideration either good or valuable, agrees that another shall have the use and income of it, and the statute steps in and annexes the legal title to the use, and thus the *cestui que use* becomes seized of the legal estate in the same manner as before the statute he would have been seized of the use. The argument, presented in a syllogistic form, is this: Since the statute of uses, freeholds can be conveyed in any manner that uses were conveyed before its passage. Before its passage, uses were conveyed to commence *in futuro*; therefore, freeholds may be conveyed to commence *in futuro* since its passage. It must be remembered, however, that neither legal estates nor uses can be so limited as to create perpetuities. If future estates are so limited as to take effect in the life-time of one or more persons living, and a little more than twenty-one years after, the rule against perpetuities will not be violated. We will refer to a few leading authors:



Mr. White, a very learned English writer, in one of his additions to the text of Mr. Cruise, says: "By executory devise and conveyances operating by virtue of the statute of uses, freehold estates may be limited to commence *in futuro*." 1 Greenl. Cruise, tit. 1, § 36.

Mr. Chitty, after stating that, by a common-law conveyance, a freehold to commence *in futuro* could not be conveyed, continues: "But deeds operating under the statute of uses, such as bargain and sale, covenant to stand seized, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro*." 1 Chit. Gen. Prac. 306; 2 Bl. Comm. 144, note 6.

Mr. Sugden says: "A bargain and sale to the use of D. after the death of S. is good." Gilb. Uses (Sugd. Ed.) 163.

Mr. Cornish: "By a bargain and sale, or covenant to stand seized, a freehold may be created *in futuro*." Corn. Uses, 44.

Chancellor Kent: "A person may covenant to stand seized, or bargain and sell, to the use of another at a future day." 4 Kent, Comm. 298.

Mr. Archbold: "Deeds acting under the statute of uses, such as bargain and sale, covenant to stand seized, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro*." Note to 2 Bl. Comm. 166.

In a note to the 5th American edition of Smith's Leading Cases (volume 2, p. 451), after noticing the Massachusetts cases in which it is held that a freehold to commence *in futuro* cannot be created by a deed of bargain and sale, the learned editors say: "It is undoubtedly true that such limitations are bad at common law; but it seems equally well settled that they are good in deeds operating under the statute of uses, whether the use be raised on a pecuniary consideration or on blood or marriage. The point is so held in England, and has been repeatedly and expressly decided in New York, and several of the other states of this country. The attributes of a use are the same, whatever may be the consideration in which it is founded; and, if uses commencing *in futuro* were without the operation of the statute when raised by a bargain and sale, they would be equally so when originating in a covenant to stand seized."

In *Rogers v. Insurance Co.*, 9 Wend. 611, the question underwent a most thorough examination, and the conclusion was that a freehold to commence *in futuro* could be conveyed by a deed of bargain and sale, operating under the statute of uses; and the court expressed surprise that any one should have ever supposed that such was not the law.

In *Bell v. Scammon*, 15 N. H. 381, the same question was raised, and the court held that "a freehold *in futuro* could be conveyed either by deed of bargain and sale, or by a covenant to stand seized."

Mr. Washburn, in his late very able work on Real Property (volume 2, p. 617, § 16), says that the reasoning of Chancellor Walworth in *Rogers v. Insurance Co.*, 9 Wend. 611, in which he maintains that an

estate of freehold, to commence *in futuro*, can be conveyed by a deed of bargain and sale, and the authorities upon which he rests, would seem to leave little doubt in the matter, beyond what arises from the circumstance that other courts have taken a different view of the law.

It is true that, in Massachusetts and this state, when determining that the deeds then under consideration were valid upon other grounds, judges have expressed the opinion that a freehold to commence *in futuro* could not be conveyed by a deed of bargain and sale; but these opinions are mere *obiter dicta*, for they have never yet had the effect of defeating a deed. The idea seems to have originated in an unauthorized statement (probably accidental) to be found in *Pray v. Pierce*, 7 Mass. 381. Having under discussion the rule that deeds should be so construed as to give effect to the intention of the parties, and not to defeat it, the case of *Wallis v. Wallis*, 4 Mass. 135, was referred to by way of illustration, and the reporter makes the court say that the deed in the latter case was held to be a covenant to stand seized, "because, as a bargain and sale, it would have been a conveyance of a freehold *in futuro* and therefore void." By turning to that case (*Wallis v. Wallis*), it will be seen that such a statement is unauthorized. The court remarked that, by a common-law conveyance, a freehold could not be conveyed to commence *in futuro*, which was unquestionably true; but the court did not say that such a conveyance could not be made by a deed of bargain and sale, which owes its validity to the statute of uses and not to the common law. Why the deed in *Wallis v. Wallis* was not sustained as a bargain and sale, instead of covenant to stand seized, does not appear. The case was submitted without argument, and, as the deed could readily be sustained as a covenant to stand seized, it may not have occurred to the court that it could just as well be sustained as a bargain and sale. On careful examination it will be seen that these cases (*Wallis v. Wallis* and *Pray v. Pierce*) are not authorities for the doctrine they are so often cited in support of.

In *Welsh v. Foster*, 12 Mass. 93, the deed, for a valuable consideration, to be paid whenever the deed should take effect, and not otherwise, purported to convey a certain part of a mill, with the land, etc., "provided that the said deed should not take effect or be made use of until the said millpond should cease to be employed for the purpose of carrying any two mill-wheels." It was held that nothing passed by the deed, not because it was to take effect only upon the happening of a future event, but because the event, if it should ever happen, might be delayed much beyond the utmost period allowed for the vesting of estates on a future contingency. The event, it was held, must, in its original limitation, be such that it must either take place, or become impossible to take place, within the space of one or more lives in being, and a little more than twenty-one years afterwards, to prevent the creating of a perpetuity, or an unalienable estate. Such is undoubtedly

the law. Besides, no consideration was ever paid for the deed, and the grantor afterwards conveyed to another. Under these circumstances the court very properly held the deed void. But the distinction made by Judge Jackson, in that case, between covenants to stand seized, and deeds of bargain and sale, is mere *dictum*, and has neither reason nor authority to rest upon.

Speaking of the qualities of a bargain and sale, Judge Jackson says: "One of these qualities is that it must be to the use of the bargainee, and that another use cannot be limited on that use, from which it follows that a freehold to commence *in futuro* cannot be conveyed in this mode; as that would be to make the bargainee hold to the use of another until the future freehold should vest." Hold what? Upon the execution of a deed in which the grantor reserves to himself an estate for life, and conveys the residue, the grantee obtains a present vested right to a future enjoyment of the property; but, until the future freehold vests, the use, the seizin, and the right of possession, remain with the grantor, and there is no conceivable thing that the bargainee will be required to "hold to the use of another."

Judge Jackson seems to have supposed that when such a deed is executed the legal estate or seizin passes immediately to the grantee, and that, until his own future freehold vests, he holds this legal estate, or ideal seizin, to the use of the grantor. But such a theory is wrong and contrary to every authority we have been able to find. In fact, under the statute of uses, such a theory, which separates the legal estate from the use, cannot be correct; for, by the very terms of the statute, the lawful seizin, estate and possession shall be deemed and adjudged to be in him that hath the use, to all intents, constructions and purposes in law; and is made applicable to "any such use in fee simple, fee tail, for life, or for years." "The seizin remains in the person creating the future use till the springing use arises, and is then executed to this use by the statute." 2 Washb. Real Prop. 232. "If raised by a covenant to stand seized, or bargain and sale, the estate remains in the covenantor or bargainor until the springing use arises." Gilb. Uses (Sugden's note), 163. A person may covenant to stand seized, or bargain and sell, to the use of another at a future day. In such a case "the use is severed out of the grantor's seizin." 4 Kent, Comm. 298. "Here is a conveyance to the bargainee to take effect at the decease of the bargainor, which creates a resulting use to the latter during life, with a vested use in remainder to the bargainee in fee, both uses being served in succession out of the seizin of the bargainor." Jackson v. Dunsbah, 1 Johns. Cas. 96.

The rule that a bargain and sale must be to the use of the bargainee, and not to the use of another, applies to only so much of the estate as is bargained for, and not to the residue, which is not bargained for and not paid for; and the rule is not violated, and there is nothing inequita-

ble or repugnant to the grant, in requiring him to wait for the enjoyment of the property till such time as, by the express terms of the deed under which he claims, he is entitled to it.

It will be noticed that Judge Jackson assumes the existence of a rule that one use cannot be limited upon another, and that it would be a violation of this rule to give effect to a deed of bargain and sale of a freehold to commence *in futuro*. Such a rule does exist in England. Mr. Watkins, in his introduction to his very able work on Conveyancing, says that "about the time of passing the statute of uses some wise man, in the plenitude of legal learning, declared there could not be an use upon an use; and that this very wise declaration, which must have surprised every one who was not sufficiently learned to have lost his common sense, was adopted." And Lord Hardwicke, in *Hopkins v. Hopkins*, 1 Atk. 591, says that by this means a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance. Mr. Williams, in his work on Real Property (page 124), says this rule has much of the technical subtlety of the scholastic logic which was then prevalent. Lord Mansfield calls it "absurd narrowness." 2 Doug. 774. Blackstone calls it a "technical scruple;" and Mr. Sugden, in a note to Gilb. Uses, p. 348, says it never ought to have been sanctioned at all. In *Thacher v. Omans* (decided in 1792), reported in 3 Pick. 521, on page 528, the court refer to the censures of Blackstone and Lord Mansfield, and express strong doubts as to the propriety of admitting it in this country; and Mr. Greenleaf says it may well be doubted whether the rule has been adopted in this country. Note to Greenl. Cruise, tit. 12, ch. 1, § 4. With such a weight of authority against it, if the effect of the rule would be to defeat such conveyances as we are now considering, we think we might be warranted in rejecting it altogether. But such is not its effect. When a freehold is conveyed, to commence at a future day, till such future day arrives the use results to the grantor, and then passes to the grantee; and the uses are not limited one upon the other, but one after the other; and, in this way, a fee simple may be carved into an indefinite number of less estates. "So long as a regular order is laid down in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus, a grant may be made at once to fifty different people, separately, for their lives." Williams, Real Prop. 189, 190. "Shifting or substituted uses do not fall within this technical rule of law, for they are merely alternate uses." 4 Kent, Comm. 301.

The statement that a freehold to commence *in futuro* cannot be conveyed by a deed of bargain and sale, which seems first to have been made in *Pray v. Pierce*, as before stated, has been several times repeated in Massachusetts (*Welsh v. Foster*, 12 Mass. 93; *Parker v. Nich-*

ols, 7 Pick. 115; Gale v. Coburn, 18 Pick. 397; Brewer v. Hardy, 22 Pick. 376), and once at least in this state (Marden v. Chase, 32 Me. 329); but the only case we have found in which an attempt has been made to give a reason for the supposed rule is that of Welsh v. Foster; and a careful examination has satisfied us that the argument in that case is unsound, and not supported by any adjudged case that has the weight of authority. It is admitted in all these cases that if it can be shown that the parties to such deeds are near relatives, effect may be given to them as covenants to stand seized, made, not as they purport to be, for a pecuniary consideration, but in consideration of love and affection. And there is no doubt that if two deeds should be executed instead of one; that is, if the grantor should first convey the whole estate, and then take back a life lease, the transaction would be held legal. The doctrine, therefore, that a freehold to commence *in futuro* cannot be conveyed by a deed of bargain and sale amounts to no more than this: that if the owner of a fee-simple estate proposes to reserve to himself a life estate, and to sell the residue, if he deals with a relative, such an arrangement can be carried into effect by making one deed; but if he deals with a stranger it will be necessary to make two. It is certainly very strange that a doctrine so technical, so easily evaded, and so utterly destitute of merit, should have gained the currency it has.

We entertain no doubt that, by deeds of bargain and sale, deriving their validity from the statute of uses, freeholds may be conveyed to commence *in futuro*. It will be seen that the law is so held in England, and by an overwhelming weight of authority in this country. In fact that such was the law seems never to have been doubted except in Massachusetts and this state; and we think the error originated in the unauthorized remark found in Pray v. Pierce, and has been repeated from time to time without receiving that consideration which its importance demanded.

We also are of opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and being duly acknowledged and recorded, as our statute require, operate more like feoffments than like conveyances under the statute of uses. In Thacher v. Omans, 3 Pick., on page 525, Chief Justice Dana, speaking of our statute of conveyances, first enacted in 1697, re-enacted in the revised laws of 1784, incorporated into the statutes of this state in 1821, and still in force, says: "This statute was evidently made to introduce a new mode of creating or transferring freehold estates in corporeal hereditaments, namely, by deed signed, sealed, acknowledged and recorded as the statute mentions; it does not describe any particular kind of deeds or conveyances, but is gen-

eral, and extends to all kinds of conveyances." On page 532 he further says: "It seems evident to me that a deed executed, acknowledged and recorded as our statute requires cannot be considered as a bargain and sale, because the legal estate is thereby passed without the operation of the statute of uses, in as ample a manner as by a feoffment at common law, accompanied with the ancient ceremony of livery of seizin." Such also were the opinions of Chancellor Kent and Professor Greenleaf. 4 Kent, Comm. 461; Greenl. Cruise, tit. 12, c. 1, § 4, note, tit. 32, c. 4, § 1, note. Mr. Greenleaf, in the note first cited, says that in most of the states (including Maine), "deeds of conveyance derive their effect, not from the statute of uses, but from their own statutes of conveyances; operating nearly like a feoffment, with livery of seizin, to convey the land, and not merely to raise a use to be afterwards executed by the statute of uses." Mr. Oliver, in his work on Conveyancing (Ed. 1853, p. 281), speaking of our common warranty deed, says: "This deed derives its operation from statute, and has therefore some properties peculiar to itself. . . . The transfer is not affected by the execution of a use, as in a bargain and sale, but the land itself is conveyed, as in a feoffment, except that livery of seizin is dispensed with, upon complying with the requisitions of the statute, acknowledging and recording, substituted instead of it." We think these views are sound; and if any of the technical rules which have grown up under the statute of uses stood in the way of giving effect to deeds executed in accordance with the provisions of our statute, simply because they purport to convey freeholds to commence at a future day, we think effect might be given to them independently of the statute of uses. But, in our judgment, no such rules do stand in the way of giving effect to such deeds. They may be upheld either as bargains and sales under the statute of uses, or as conveyances deriving their validity from our own statutes.

Having come to the conclusion that the demandant is entitled to recover upon another ground, it was not necessary to consider the validity of the deed from Mrs. Brown to Oliver S. Nay, which purports to convey a freehold to commence *in futuro*. But, as the question involved is an important one, and was ably argued by the counsel in the case; and, as the court has already decided one case within the past year (*Hunter v. Hunter*, in the county of Sagadahoc), in accordance with the views here expressed, but without any written opinion; and as several other suits, involving the same question, are still pending before the court, we deemed it best to make known our decision of the question, and to state our reasons for the decision, in connection with this case. Judgment for demandant.

**Hale et al. v. Hale et al.**

Decision by Supreme Court of Illinois, June 16, 1887. Opinion by Scott, J.

*(Reported in 125 Ill. 399.)*

The bill in this case is for partition of the real estate of which Ezekiel J. M. Hale died seized, and which is situated in the county of Cook, in this state, and was brought by one of the heirs in the superior court against the widow, the executors and the other heirs of the decedent. Concerning the facts out of which the litigation arises no controversy exists. Prior to his death the common ancestor of the heirs, claiming his estate in Cook county as intestate property, resided at Haverhill, in the state of Massachusetts. At the time of his death he owned a large estate in Massachusetts, consisting of both real and personal property, all of which it is conceded was disposed of by his will, which was, after his death, admitted to probate in that state, and which is conceded by all parties interested to be valid under the laws of Massachusetts. The testator also left a large amount of property situated in the state of New York, and the property involved in this litigation in Illinois. The larger portion of the estate seems to have been in Massachusetts, where the testator had resided and where his will was admitted to probate. It seems the testator gave various legacies and devises, and provided in different clauses of his will for life annuities to a number of persons, perhaps twelve in all, and for other annuities, payable at stated periods, until the final division of the residue of his property under the provisions of his will. It is understood, and perhaps admitted, that there is sufficient estate in Massachusetts out of which to pay all legacies, devises and annuities provided for or declared in the will. It is not claimed that any of the property belonging to the estate situated either in New York or this state will be wanted for the payment of either legacies, devises or annuities under the will. The bill in this case alleges the will of Ezekiel J. M. Hale, deceased, was admitted to probate in Massachusetts, where he died, no one objecting; which is an admission it was valid, and disposed of all the property belonging to the estate in that state. But the bill is framed on the theory it was not the intention of the testator to devise the real estate now sought to be partitioned; that the scheme of his will was not adapted to the condition of his estate in New York and in Illinois, and was not intended to convey the same; that by the laws of Illinois and New York the devise was void, and had been so declared by the courts of the latter state; that such testator well knew that the provisions of his will, if applied to his real estate in New York and Illinois, made the same illegal and void on account of the statutes of such states prohibiting perpetuities; that, if the provisions of the will should be applied to the lands in Illi-

nois or New York, the same could not be alienated for many years, and not until after the death of twelve life annuitants; that the property in Illinois is unproductive, and cannot be made productive; that the taxation upon it is large, and that the interest and taxation will entirely absorb the value of said real estate, so as to render it a total loss to the heirs, if it should be held to be included within the terms of the will, and hence not subject to division except in accordance with the will. It is alleged the property situated in New York belonging to the estate exceeds in value \$1,000,000, and that in Illinois is now estimated to be of the value of \$300,000. The executors answered the bill, as they were required to do, in which they admitted most, if not all, of the formal charges in the bill, but insisted the lands sought to be partitioned passed to them under the residuary clause of the will of the testator; and, on filing their answer, they filed a cross-bill, in which they claimed to have the power under the will to sell such real estate, and ask the court to so decree. The respondents in their cross-bill make the same allegation as is contained in the original bill; that, unless the property described in the bill can be sold, it will be absorbed by taxes and assessments and other expenses before the time for distribution would arrive under the provisions of the will. The superior court, at the hearing of the cause, dismissed the cross-bill of respondents, and found that the property described in the original bill was intestate property, and decreed a partition of the same, as it was asked to do. That decision is assigned for error.

The residuary clause of the will out of which all the questions made on this record arise is as follows: "Twenty-second. As to the residue and remainder of all my estate, both real and personal, not herein otherwise disposed of, it is my will that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors, well and safely invested, until the decease of the last survivor of the life annuitants named in my foregoing will; and that then the said residue and remainder, with all the accumulated interest thereof, shall be divided equally among my grandchildren *per stirpes*, to hold to such grandchildren so distributed, and to their heirs, executors, administrators and assigns forever." Most of the other clauses of the will contain provisions for legacies, bequests, devises and annuities to certain persons, and others contain specific directions as to what disposition shall be made of certain property; and beyond giving an outline of the general scope of the will, and the intention of the testator as to the management of his estate by his executors and trustees, they contain nothing that is important in connection with the present discussion, and their contents need not be stated other than in a general way.

Two principal questions are made by the original and cross-bills: (1) Whether the lands involved were devised by this clause of the will,



or whether the same can be treated as intestate property, as not being embraced in the will: and (3), if it shall be held the lands were devised, is any power given the executors and trustees, either expressly or by implication, by this or any other clause of the will, to sell these lands at any time within their discretion? It will be found most convenient to consider these questions in the inverse order in which they are stated, which will be done briefly.

There is and can be no pretense that any express power is given to the executors and trustees to sell any real estate situated in New York or in Illinois that had belonged to the testator by the twenty-second clause, or any other clause, of his will; and if any such power exists in them it must arise by implication from powers conferred or duties expressly imposed by the will in regard to such real estate. Power is expressly conferred upon the executors and trustees to sell certain real property, as in the second clause of the will, but nothing is said anywhere in the will concerning the sale of real property in New York or Illinois. It is not even mentioned by any description, by location, or otherwise. If it is devised at all, it is by the twenty-second or residuary clause of the will, and not otherwise. But does the twenty-second paragraph of the will confer any power upon the executors and trustees to sell real estate situated in New York or Illinois, even by implication? It is thought it does not. There can be no doubt of the correctness of the rule stated by counsel that authority to sell and convey trust property may be conferred by implication; as, for instance, where duties are imposed by the instrument creating the trust upon the trustee, which he cannot perform without making a sale, the law will imply the necessary power; otherwise there would be a failure of the objects of the trust. A most common example is where there has been an assignment for the payment of debts; if no express power is given to sell the trust property, the duties to be performed by the trustees will necessarily create the power of sale, for it is obvious in no other way could the trustee perform the duties required of him by the instrument creating the trust. The law will not permit a trust to fail because it may be inartificially declared or expressed. This is undoubtedly as liberal a statement of the implied powers of trustees as the law will sanction. Applying this rule, neither the twenty-second clause, nor indeed any other provision, contains anything that indicates, by implication or otherwise, it was the intention of the testator that his executors and trustees should have power to sell and convey any of his real property, either in New York or Illinois, for the purpose of converting it into personalty. The words supposed to manifest the intention of the testator in this regard are "that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors, well and safely invested, until the decease of the last survivor of the life annuitants named in the foregoing will." It is said

the words "well and safely" mean that the testator gives the executors and trustees the usual authority to make prudent investments, and that they mean they must keep the property invested. The vice of the argument on this branch of the case lies in detaching these words from their place in the will, and giving to them a meaning inconsistent with the context. What is the direction given by the testator concerning this property in New York and Illinois? It is that it "remain in the care and control" of the executors and trustees, "well and safely invested." That is, it is to "remain," as now, "well and safely invested." Any other would be a strained and unnatural construction of the words of the will. So far from indicating any intention on the part of the testator that his executors and trustees should sell his lands either in New York or Illinois, the words used indicate unmistakably it was his intention and purpose they should "remain" in the care and control of his executors and trustees, "well and safely invested," as they then were, until the time appointed for the distribution of the residue of his estate, both real and personal, should arrive. The principle running through all the cases on this subject, so far as the writer has been able to examine the same, is, the provisions of the will must be so clearly written as to leave no doubt of the intention of the testator to have his real estate converted into personal estate, to sustain the doctrine of what is called equitable conversion. That intent does not appear from any language used by the testator in this case, and it is not perceived his trustees have any implied power to change the real property devised into personal estate for reinvestment or otherwise. This precise question was presented to the court of appeals of the state of New York by the same parties to this litigation; and in an action brought by these executors and trustees to obtain a construction of certain provisions of the last will and testament of Ezekiel J. M. Hale, deceased, that court held, after most elaborate argument, the will, while valid under the laws of Massachusetts, where the testator died and where his will was admitted to probate, contained no express direction for the conversion of real estate into personalty, or for the sale of the real estate. *Hobson v. Hale*, 95 N. Y. 588. This court is entirely satisfied with the conclusion reached by the court of appeals in that case, and the elaborate discussion there given to the exact question involved in the case now being considered would seem to relieve this court from the necessity of any extended consideration of the question. Under this view of the meaning of the will, the relief demanded by the cross-bill, that the right of complainants in that bill to sell and convey the lands involved and to convert the same into money may be established and declared, was properly denied.

The remaining question arises on the original bill, and is whether the lands situated in Illinois, and which belonged to the estate of the testator, were devised by the residuary clause of the will, or whether

the same can be treated as intestate property, as not being embraced in the will. There is evidence tending to show that the court found by its decree that the testator bought these lands in Cook county for speculation, and that had he lived it is probable he would have sold the same on receiving the first favorable offer. That he gave expression to such views is proved past all doubt, but whether he changed his mind in that regard before his death of course cannot be known. Construing the will in the light of the surrounding circumstances, as the law requires shall be done, does it show the testator intended to omit these lands from the operation of his will? It is seen that the residuary clause of the will is as broad and comprehensive as it can well be expressed. It is, "As to the residue of all my estate, both real and personal, not herein otherwise disposed of." Primarily the words "all my estate" mean all the estate of the testator, wherever situated, and that meaning will always be given to them unless something in the context will show a more restricted construction will better comport with the clear intention of the testator. It will be noticed that the real estate of the testator situated in New York, if devised at all, was devised by this same clause of the will. There is no other clause of the will that can have the slightest application to it. If the lands in Illinois shall be held not to have been devised by the twenty-second clause of the will, the conclusion would necessarily be the New York lands were not within its operation. No one has ventured to suggest the testator did not intend by this clause of his will to devise his property in New York. When the case was before the court of appeals of New York, that court seems to have held, without much discussion, the property in that state was devised by the will; for it was said: "While it should not be overlooked that the testator was domiciled in the state of Massachusetts, and his will was executed there, it should also be borne in mind that by his will he devised his real estate, as real estate, situated in the state of New York." Any other conclusion would be too improbable to be adopted. The same words in the will that are held to constitute a devise of lands in New York include also the lands in Illinois. Either the lands in both states are devised, or they must be treated as intestate property in both states. It is incredible that a testator making a will that by its terms, when understood in their primary sense, disposes of all "his estate, both real and personal," omitted therefrom property conceded to be of the value of over \$1,200,000. Such a proposition is too improbable to be adopted, unless the testator was incapable of comprehending what he was doing. Plainly the residuary clause of the will is broad enough to include all the property of the testator, no matter where situated, and there is nothing in either of the attendant circumstances, or in any other clause of the will, that shows any intention on the part of the testator to omit any property in Illinois or elsewhere from its operation. When this case was before

the court of appeals of New York it was held that the clause of the twenty-second paragraph of the will that postponed the final division of the estate until the death of the last survivor of the life annuitants, so far as it applied to real estate in that state, worked an unlawful suppression of the powers of alienation, and was for that reason void, and it was also held that such clause was repugnant to the provisions of the statute of that state prohibiting accumulations except for the times and purposes therein permitted. No such objection lies to that provision of the will in this state. A perpetuity in this state is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being and twenty-one years beyond. Here the right of alienation is not suspended for any period beyond the lives of certain persons in being, and hence this provision of the will is not repugnant to any rule of law in this state inhibiting perpetuities. But it is said a construction that would postpone the alienation of this property for more than fifty years is opposed to public policy. The limitation fixed is to terminate at the death of certain life annuitants, and of course when that contingency will happen is a matter of the merest conjecture. It might occur within five, ten, twenty, forty or sixty years. Of course the time is indefinite, and all that can be known concerning it with any degree of certitude is that it is sure to happen sooner or later. The time for which the executors and trustees are to hold the residue of the estate, for which there might be a suspension of the right of alienation of the property in controversy, is limited to the death of the last survivor of the life annuitants, and it is not perceived that in that respect it contravenes any public policy existing in this state. The decree of the superior court dismissing the cross-bill will be affirmed, and the decree granting the relief demanded on the original bill will be reversed, and the cause will be remanded, with direction to that court to dismiss the original bill also.

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## CHAPTER XV.

### MORTGAGES.

#### Helm v. Boyd.

Decision by Supreme Court of Illinois, March 27, 1888. Opinion by Magruder, J.

*(Reported in 124 Ill. 370.)*

STATEMENT OF FACTS.—This is a bill in chancery filed in the circuit court of Wabash county by the appellee, Helen G. Boyd, against the appellant, James M. Helm, who is her brother. Appellee, whose maiden

name was Helen G. Helm, inherited from her mother, who died in July or August, 1874, one-seventh of a tract of seven hundred and forty-two and forty-one one-hundredths acres in Wabash county, and one-seventh of a part of block eighteen, in the town of Grayville, in White county. By a quitclaim deed, dated and acknowledged January 10, 1882, and recorded on June 9, 1884, in White county, and on January 21, 1885, in Wabash county, appellee and her husband, James S. Boyd, conveyed the said one-seventh interest in said property to John J. Helm, appellee's father, for an expressed consideration of \$1,000. By a quitclaim deed dated and acknowledged January 17, 1885, and recorded January 21, 1885, John J. Helm and his wife, Annie V. Helm (the latter being appellee's step-mother), conveyed said interest for an expressed consideration of \$1,000 to the appellant, John J. Helm's son, reserving to John J. Helm the use and benefit of said premises during his life. Appellee alleges in her bill that her one-seventh of said property was worth \$3,000 on January 10, 1882; that on that day her father loaned her \$1,000, without interest, and that she and her husband made the quitclaim to him to secure such loan; that the deed was not intended by her and her father to be an absolute one, but that it was expressly agreed between them that he should hold the deed and the land as security for the loan, and should reconvey the land to her upon repayment of the \$1,000; that when her father deeded her interest to defendant, her brother, the latter had due notice and full knowledge of her rights, and of the terms on which her father held the property; that it was expressly agreed between her father and the defendant that she should have the right to redeem upon paying defendant \$1,000, with legal interest; that defendant, since the death of John J. Helm, their father, in March, 1886, has collected \$300 of rents; that on December 2, 1886, she tendered to defendant \$1,000, with legal interest, and offered to pay him what was due to him, but he refused to accept the money or reconvey the premises. The bill prays for an account, and that, upon the payment to defendant of the amount due him, he may be required to reconvey and deliver possession of the premises to the complainant. The answer admits the original ownership by complainant and the execution of the quitclaim deeds, but denies that the deed to John J. Helm was made to secure a loan, and claims that it was made to carry out a sale of the property, and that John J. Helm paid complainant \$1,000 as purchase-money. The answer also denies that when the defendant took the deed from his father he had any notice of complainant's alleged interest in the premises, and claims that he bought the property in good faith, and paid \$1,000 for it, and that \$1,000 was its full value; and furthermore denies that defendant agreed to allow complainant to redeem, or that he collected \$300 of rents. The answer claims the benefit of the statute of frauds. Replication was filed to the answer, and the cause was heard upon bill, answer, replication and

proofs taken and filed. The circuit court found the allegations of the bill to be true, and decreed that appellee should pay to appellant, within sixty days, \$992.40, with six per cent. interest from May 26, 1887, till paid, and that thereupon appellant should convey all his right, title and interest in the premises to appellee, and upon his failure to make such conveyance within twenty days after such payment it was ordered that the master make the deed, etc.

OPINION.—The first question is whether the deed from appellee and her husband to her father, John J. Helm, was an absolute conveyance or a mere mortgage security. The statute says: "Every deed conveying real estate, which shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage." Starr & C. Ann. St., p. 1636, ch. 95, entitled "Mortgages," § 12. A deed absolute on its face may be shown by parol to be a mortgage. The law will, however, presume, in the absence of proof to the contrary, that such a deed is what it purports to be — an absolute conveyance. The party who claims an absolute deed to be a mortgage must sustain his claim by proof sufficient to overcome this presumption of the law. Before a deed absolute in form will be held to be a mortgage, the evidence must be clear, satisfactory and convincing. It must be made to appear clearly that such a conveyance was intended to be a mortgage at the time of its execution. The question is one of intention, to be ascertained from all the circumstances. *Sharp v. Smitherman*, 85 Ill. 153; *Bartling v. Brasuhn*, 102 Ill. 441; *Bentley v. O'Bryan*, 111 Ill. 53; *Workman v. Greening*, 115 Ill. 477, 4 N. E. R. 385.

An examination of the testimony is necessary in order to see what the real intention of the parties was. It is not clear from the evidence whether appellee's mother died before or after July 1, 1874. But it is admitted by counsel on both sides that John J. Helm had a life interest as tenant by the curtesy in the one-seventh part of the premises in question, which appellee inherited from her deceased mother. When she deeded her one-seventh interest to her father, on January 10, 1882, she was only twenty years old, and had been married only about six months. Appellee swears that her father proposed to her to advance \$1,000 to her husband, James S. Boyd, to start him in business; that her father said he did not want the land, and that the payment of the \$1,000 was merely an advancement made to help her and her husband, and that it would all come back to her; that he told her the land had been left to her by her mother, and should all come back to her and her children; that she never asked her father for money when he proposed to advance money on the land; that she never offered to sell the land to him, and he never offered to buy it; that when she signed the deed he said to her: "You and Jim are young yet, and I merely do this to have a little jurisdiction over it. As for the deed being recorded,

there shall never be a scratch of the pen against your property. As far as the \$1,000 is concerned I will make that right with the other children;" that in July, 1885, when she learned that her father had recorded the deed from her, and had made a deed of the land to her brother, the appellant, she asked him about it, and he replied: "I transferred to Jimmy Helm under the same conditions that I got it from you, and he is to let you have it back. I did it to keep Annie [the second wife] and her children from getting a foothold; . . . your brother will do what is right;" that when she made the deed to her father, she did not know how much land she owned or was conveying, or anything about its value; that an hour after she made the deed her father paid \$500, and the balance in small amounts from time to time; that there was no agreement between her and her father about paying him the \$1,000, etc.

James S. Boyd swears that in November and December, 1881, and again about January 1, 1882, John J. Helm proposed to advance money to him to go into business by buying an interest in a printing-office, and said he would take a quitclaim deed on Helm's portion of the property, and let them have \$1,000, part of which he would pay next morning; that "he requested me to explain the matter to my wife; he said for me to have no fears, for the amount would all come back to us children, and he would make it satisfactory with the other children;" that John J. Helm "said he took the deed to have a little jurisdiction over us and the amount he advanced us, as we were both young, and that the deed should never be recorded;" that he talked with his wife, and told her to do what she thought best, and she said she was satisfied her father would "stick to what he says;" that the next morning he told Mr. Helm his wife "was willing to get or borrow the money;" that neither he nor his wife knew the amount or value the deed called for; that he never offered to sell his wife's land to her father, nor asked him to furnish money to go into business with; that when the deed was made Mr. Helm said: "I merely advanced this much money on the place; . . . eventually this will all come back to her: I will see that it is made up to the other heirs;" that his wife's father never stated that he expected the \$1,000 to be paid back to him, and never asked for it.

Annie V. Helm, widow of John J. Helm, and stepmother of appellee, swears that her husband told her, before Mrs. Boyd made the deed to him, that he wanted to get the deed to keep them from disposing of the land to Mr. Gray (the brother of Helm's first wife); that after her husband received the deed he said he intended to give it back to appellee, and merely wanted to get it in such a way that she could not dispose of it; that he never had the deed recorded on that account; that appellant wrote to his father, advising the latter to get a deed from Helen to prevent the land going into Gray's hands, and that such letter was

sent to Mrs. Malcom Eastwood (appellant's sister), to prevent it from falling into the wrong hands; that on the evening before she and her husband conveyed the premises to appellant, her husband said to her: "He [appellant] wants me to make that property over to him, and I don't want to do it;" that she (witness) did not want to sign the deed to James, and reminded her husband of his promise to give the land back to Helen, and he said that "Jimmie would make it all right with her."

Jane Kelton swears: "A short time before John J. Helm made the deed to James M. Helm for said lands I heard said John J. say. Jimmie would hold the property for Ella the same as he had, and Mrs. Helm objected to doing it."

George W. Cline, the attorney who drew the deed made by appellee to her father, swears that before the deed was executed John J. Helm told him that he wanted the deed so that he could control the property, and keep Boyd from disposing of it "if he got to drinking;" and that he was afraid Gray might get hold of it; that Helm also told him that the property would go to Ella at his death, and that "he did not want it to get mixed up with his other property."

The testimony of Catharine A. Wintermute confirms the evidence of appellee and Annie V. Helm in several particulars.

There is considerable amount of testimony in the record as to the value of the land. After a careful examination of it, we are satisfied that appellee's one-seventh interest in the property, notwithstanding the fact that it was an undivided interest, and subject to her father's life estate, was worth very much more than \$1,000 when she made the deed to her father, and when the latter made his deed to appellant.

Appellant testified as follows: "About the first of 1885 said John J. Helm told me he had bought Mrs. Boyd's share of her mother's estate; that he had advised her not to sell it, and told her that at his death the property would be worth more than she could then realize on it on account of his life estate; that she insisted on his buying it, and said if he did not she would sell to some one else; that he bought the property to keep it from falling into other hands, and paid her \$1,000 for it, and that he had to borrow money to pay for it. He proposed that I buy it from him at the same price to prevent Mrs. Helm No. 3 and her children getting a foothold in my estate."

Mary W. Helm, a sister of appellant and appellee, testified on behalf of appellant as follows: "I heard a conversation between father and complainant, in which he advised her not to sell her interest in said lands. He told her it would be worth more at his death than she could get for it then. She wanted \$1,200, and he told her he could not give more than \$1,000; that he did not think any one would give more than that when they could not get possession until he died. She said she would rather have the money then, to buy a homestead. They were on



the front porch and I was in the hall. I think this was in July, 1881. I also heard Pa tell Mr. Boyd that he thought Ella was very foolish to sell her land."

John J. Helm, Jr., and J. R. Eastwood testified as to declarations of John J. Helm, to the effect that he purchased the property; but, as these declarations were made in his own favor, and in the absence of appellee, they were clearly incompetent.

The circuit judge found that the deed from appellee to her father was a mere security, and we are unable to say that the evidence does not sustain his finding. The relation in which John J. Helm stood to his daughter naturally gave him great influence over her. The price which he is claimed by appellant to have paid her for her property was greatly below its real value. Her statement that he promised not to record the deed is confirmed by the fact that such deed, although executed on January 10, 1882, was not, as matter of fact, recorded in White county until June 9, 1884, nor in Wabash county until January 21, 1885. It is true that she did not agree to pay back the \$1,000 at a definite time. Her father would appear to have held out to her the idea that she would get enough from his estate to pay back the \$1,000, or that there would be enough coming to her from his estate to cancel the indebtedness of \$1,000. Still, the impression made by the evidence is that, if he did not actually practice a fraud upon her, he induced her to deed to him her property under the belief that in some way it was to come back to her, and that she was not to be troubled about repaying the amount advanced to her. We said in *Workman v. Greening*, *supra*: "If it shall appear, no matter what the form of the transaction, that the conveyance is in fact but an indemnity or security, it will be held a mortgage; and the character of liability against which indemnity is intended, or the kind or dignity of indebtedness intended to be secured, is important."

The next question is whether appellant had notice of appellee's rights when he received the deed from his father of his sister's one-seventh interest. There is testimony that he had actual notice of such rights. Mrs. Helm, who is a disinterested witness, swears that when she and her husband were having a conversation about her signing the deed to appellant, and while she was reminding him of his promise to give the land back to appellee, and was refusing to sign the deed he wanted her to sign, the appellant was in the adjoining room or hall, and called out to his father, "Make her sign it,"—showing that he heard the conversation.

The decree directs that there shall be returned to appellant the \$1,000 which he paid to his father, with interest thereon, subject only to the deduction of rents received by him from the property. We think the decision of the court below does justice between the parties. The decree of the circuit court is affirmed.

### Russell's Appeal.

Decision by the Supreme Court of Pennsylvania, 1850. Opinion by Coulter, J.

*(Reported in 15 Pa. St. 319.)*

Roberts, the defendant, as whose estate the land was sold, purchased it by articles of agreement, dated 11th of April, 1846, for \$800, of which he paid \$463, went into possession, and remained in possession until the sale and distribution of the money below. Roberts became embarrassed with debts, and on the 5th of July, 1848, he executed to Stone & Graves and Graves & Moore an assignment of the contract with Dunn under which he held the land, and all his right and title thereby acquired, as collateral security for the amount due them.

This assignment was never recorded, and Roberts still remained in possession. On the 19th of August, 1848, after the unrecorded assignment, Russell obtained his judgment, and on the 9th of September following, McGowan obtained his judgment. These two judgments claim the money produced by the sale, according to their priority. But on the 1st of December, 1848, Roberts, by parol, surrendered the land to Graves, one of the assignees; and on the same day, Dunn and wife conveyed to C. C. Graves, consideration mentioned in deed, \$900. On the 4th of December, 1848, Graves and wife conveyed to H. D. Roberts, the defendant, who gave a judgment note to Graves for \$800, which was immediately entered up.

To this last judgment the court below awarded the whole money made by the sale on Russell's judgment. It was contended by Russell and McGowan that they were entitled to the whole fund, because the note given by Russell falsely and fraudulently recited that it was for the purchase-money. But it is well enough to deliver the case at once from this argument, because these judgments could only bind the equity, if they bound anything, which was in Roberts at the time they were obtained, that is, after the assignment to Graves & Moore. The stream cannot rise above the fountain. And the balance of purchase-money then due was a previous, valid, subsisting lien. The shuffling between Dunn, Roberts and Graves cannot give to Russell and McGowan more than they were entitled to, nor deprive Dunn or his representative of that to which he had a lawful claim.

The real question then is, whether the judgments of Russell and McGowan bound the equity which Roberts had in the land at the time of the assignment to Graves & Moore? And that will depend upon the effect of that assignment. It was not an absolute sale or transfer of the equity, because it is expressed on its face to be a collateral security for the payment of a debt. It was, therefore, at most, nothing more than a mortgage. Even although a conveyance be absolute in its terms,

if it is intended by the parties to be a mere security for the payment of a debt, it is a mortgage. *Keene v. Gilmore*, 6 Watts, 409; *Clark v. Henry*, 2 Cow. 324; *Henry v. Davis*, 7 Johns. Ch. 40. Roberts still continued the debtor of Graves & Moore. The debt was not extinguished; it was therefore a mortgage. Nor has the writing the distinctive marks of a conditional sale, for the same reason, to wit, that the original debt was, by the face of the papers, still subsisting. But it was never recorded, and therefore must be postponed to a subsequent judgment. *Jaques v. Weeks*, 7 Watts, 261, 17 Serg. & R. 70; St. March 28, 1820; *Dunl. Laws Pa.* (2d ed.), p. 354. It is contended, however, that the contract for the conveyance of the land to Roberts was but a chose in action, and that the assignment passed the title without the necessity of recording; that it is not within the recording acts; and *Craft v. Webster*, 4 Rawle, 241, and *Mott v. Clark*, 9 Pa. St. 399, were cited. But these cases do not carry the defendant in error through. An article of agreement for the sale of land, accompanied by delivery of possession and payment of part of the purchase-money, is much more than a chose in action; it is an abiding interest in the land itself. It may be bound by judgment; is the subject of judicial sale, not as a chattel, but as an interest in the land. In the early history of Pennsylvania, improvement rights were considered as chattels. But this time has long passed, and pre-emption or inchoate interests are bound by judgments and sold, because every interest arising out of real estate, equitable as well as legal, is considered as an interest in the land. Thousands of acres are held in this commonwealth by location and survey only. It would sound strangely to a lawyer of the interior to say that these interests were not real estate, and the transfer or incumbrance of them not subject to the recording laws. Such a doctrine would upset estates and change the accepted principles of the commonwealth. They have from ancient time been dealt with by the people as interest in real estate, like other equitable interests in land; and, being the subject of contract and sale as such, there is the same reason for their being subject to the recording acts as the legal title. The experienced and learned counsel states that he has been unable to find any reported case in which such equities were adjudged to be the subject of the recording acts. But it may never before have been drawn in question. I know very well, and I think every practitioner is acquainted with the fact, that mortgages are often given upon equitable estates, and that equitable estates are often the subject of bargain and sale; and I may say that I don't recollect to have seen it contended in any case that the recording acts applied only to strictly legal titles, or that judgments were liens or attached only upon legal estates. The subsequent judgments, therefore, became liens at the time of their entry upon the equitable interest of Roberts, the assignment to Graves & Moore being merely a mortgage or security for a debt, and therefore, not being recorded, must give way to the subsequent judgments.

The decree is therefore reversed, and it is modified so as to award to the legal title, or those representing it, so much of the money or funds in court as was due for balance of purchase-money by Roberts at the time Russell obtained his judgment; and the residue is awarded to Russell's judgment, unless the residue will more than satisfy it; and in such case what remains is awarded to McGowan's judgment.

The record is remitted to the court below for the purpose of carrying out this modified decree.

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## CHAPTER XVII.

### INCORPOREAL HEREDITAMENTS.

#### Post v. Pearsall.

Decision by Court of Errors of New York, December, 1839. Opinion by Walworth, Chancellor.

(Reported in 22 Wend. 425.)

Nearly the whole law on the subject of customary rights, easements and public highways, and places in the nature of highways or public walks for health or recreation, and also of dedications for charitable or pious purposes, and the various decisions on these subjects, both in this country and in England, are collected in the very learned and elaborate opinion of Mr. Justice Cowen, who gave the reasons for the decision of the supreme court in this case, and in the case of *Pearsall v. Hewlett*, 20 Wend. 111, which is also before us for decision at this time. Little, therefore, remains for me but to apply the legal principles thus collected to the facts of the case under consideration.

The plaintiff in error claims a prescriptive right for all the inhabitants of the state, or the public at large, to enter the *locus in quo*, which is unquestionably the soil and freehold of Pearsall, and to use it as a landing place to deposit manure brought thither by water, and to load and unload manure and other materials thereon. If this was claimed as a customary right in behalf of the inhabitants of the town, hamlet or other local district, it might be necessary to decide whether a right to deposit manure and other materials upon the land of another, and let them remain there until the depositor could make sale thereof, or until it suited his convenience to remove them, was such an easement as could be prescribed for as a customary right, without reference to any dominant tenement; or whether it was a profit *a prendre*, or such an interest in the soil and freehold of another as could only be prescribed for in a *que* estate. In the great contest between the ball players and the rabbits relative to the right of deposit and the privilege of

scratching within the golfing links of St. Andrews, which case was twice before the house of lords in England, the late Lord Chancellor Eldon, although he amused their lordships at the expense of the Scottish judges, the magistrates of St. Andrews, the officers and students of the college, and of the golfing society, and was a little smutty withal, had in that case a strong impression upon his mind that a customary servitude or easement could not be supported, which would deprive the owner of the servient tenement of the whole beneficial use of his property. See *Dempster v. Cleghorn*, 2 Dow, 40. I presume that strong impression was founded upon the established principle of the common law, that a custom, to be good, must be reasonable; and I doubt whether any member of this court would consider a custom reasonable which should allow the community at large to deposit manure, without restriction as to kind or quantity, upon his premises, within a few rods of his mansion; and to suffer it to remain there until it suited the convenience of the depositors to remove it; especially if it should be bone manure, a commodity with which it seems the farmers in the neighborhood of the *locus in quo* have recently found it profitable to enrich their farms. Indeed, in its legal effect upon the rights of the owner of the soil, it is very difficult to distinguish the occupancy claimed in this case from the temporary occupancy by fishing huts, which was claimed in *Cortelyou v. Van Brundt*, 2 Johns, 357. But as the law is well settled that a customary accommodation in the lands of another, to be good, must be confined to the inhabitants of a local district, and cannot extend to the whole community or people of the state, the right claimed by Post, the plaintiff in error, cannot be sustained as a customary right or easement consistently with the rules of law.

Nor can it be sustained as an ordinary easement, founded upon a presumed grant from the owner of the premises in which the right or easement is claimed. Such easements are either personal and confined to an individual for life merely, or are claimed in reference to an estate or interest of the claimant in other lands as the dominant tenant; for a profit *a prendre* in the land of another, when not granted in favor of some dominant tenement, cannot properly be said to be an easement, but an interest or estate in the land itself. The three personal servitudes of the Roman law, use, usufruct and habitation, and which are still retained in the laws of France and of Spain and of Holland, were not, strictly speaking, servitudes, but limited estates in the land; and they are now separately provided for as such by the Napoleon Code, one article of which expressly declares that servitudes cannot be personal, and that they can only exist when imposed upon an estate and for the benefit of an estate. Article 686.

Neither can the right claimed in this case be sustained upon the principles upon which the dedication of highways and streets for the passage of carriages and other conveyances, and of public squares in cities

and villages as promenades for the health and exercise of the inhabitants, have been declared and adjudged to be public rights. Public places of this description, as well as public highways, were well known even in the days of Justinian, and were protected by the same pretorian interdict from all obstructions which could interfere with the free passage of the people, without the consent of the public authorities. Poth. Pand. de Just., lib. 43, tit. 8, art. 1. They were equally well known in the ancient law of France, and embraced the public squares and promenades, where the whole community had a right to go; and the places where the public fairs were held. 14 Guizot, Requet art. "Public." Although at the time of the publication of the laws of William the Conqueror there were but four great roads in England called the king's highways, yet no one can doubt that there were, even at that time, innumerable thoroughfares, and many squares and open spaces, which had been dedicated to the use of the people at large, for passages and promenades; and the number since that time has probably increased an hundred fold. The law of dedication, therefore, which was applicable to thoroughfares, was properly applicable to market places and promenades, although they were not highways in the ordinary sense of the term. But a public place for landing and depositing manure must, from its very nature, be confined to a very few individuals; and would generally be permitted as a mere neighborhood accommodation, while the owner of the land on which it was deposited had no immediate use of the premises himself. The only right, therefore, which would be likely to be acquired by long user would be a right of easement or accommodation in favor of the owners of the farms, for the use of which the manure had from time to time been brought, so as to authorize their successors in such ownership to prescribe in a *que* estate. I think, therefore, it would be most unreasonable to apply the principles of dedication to such a case. A dedication for pious or charitable purposes does not vest a legal right but merely creates a pious or charitable trust, which under our statute relative to religious corporations is turned into a legal estate. *Dutch Church v. Mott*, 7 Paige, 77; *Curd v. Wallace*, 7 Dana, 192. Such a dedication, therefore, has no applicability to the case under consideration.

The rights to public watering places on Long Island can be sustained either as customary rights, or as easements appurtenant to the estates which have been supplied with water therefrom, for a sufficient time to raise the legal presumption of a grant. The right to take water from the pond of another is a mere easement, and not a profit *a prendre*. *Manning v. Wasdale*, 2 Harr. & W. 431.

I think the judgment of the court below in this case was not erroneous, and that it ought to be affirmed.

**Thurston v. Hancock et al.**

Decision by Supreme Judicial Court of Massachusetts, March Term, 1815. Opinion by Parker, C. J.

*(Reported in 12 Mass. 220.)*

The facts agreed present a case of great misfortune and loss, and one which has induced us to look very minutely into the authorities, to see if any remedy exists in law against those who have been the immediate actors in what has occasioned the loss; but after all the researches we have been able to make, we cannot satisfy ourselves that the facts reported will maintain this action.

The plaintiff purchased his land in the year 1802, on the summit of Beacon Hill, which has a rapid declivity on all sides. In 1804 he erected a brick dwelling-house and out-houses on this lot, and laid his foundation, on the western side, within two feet of his boundary line. The inhabitants of the town of Boston were at that time the owners, either by original title or by an uninterrupted possession for more than sixty years, of the land on the hill lying westwardly of the lot purchased by the plaintiff. On the 6th of August, 1811, the defendants purchased of the town the land situated westwardly of the lot owned by the plaintiff; and, in the same year, commenced leveling the hill, by digging and carrying away the gravel; they not actually digging up to the line of division between them and the plaintiff; but keeping five or six feet therefrom. Nevertheless, by reason of the hill, the earth fell away, so as in some places to leave the plaintiff's foundation wall bare, and so to endanger the falling of his house, as to make it prudent and necessary, in the opinion of skilful persons, for the safety of the lives of himself and his family, to remove from the house; and, in order to save the materials, to take down the house, and to rebuild it on a safer foundation. The defendants were notified of the probable consequences of thus digging by the plaintiff, and were warned that they would be called upon for damages in case of any loss.

The manner in which the town of Boston acquired a title to the land, or to the particular use to which it was appropriated, can have no influence upon the question; as the fee was in the town without any restriction as to the manner in which the land should be used or occupied.

It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it.

The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own as not to injure the property or impair any actual ex-

isting rights of another. "*Sic utere tuo ut alienum non lædas.*" Thus no man, having land adjoining his neighbor's which has been long built upon, shall erect a building in such manner as to interrupt the light or the air of his neighbor's house, or expose it to injury from the weather or to unwholesome smells.

But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege which by such act is impaired. Therefore it is that, by the ancient common law, no man could maintain an action against the owner of an adjoining tract of land for interrupting the passage of the light or the air to a tenement unless the tenement thus affected was ancient, so that the plaintiff could prescribe for the privilege of which he had been deprived, upon the common notion of prescription that there was formerly a grant of the privilege, which grant has been lost by lapse of time, although the enjoyment of it has continued.

Now, in such case of a grant presumed, it shall, for the purposes of justice, be further presumed that it was from the ancestor of the man interrupting the privilege, or from those whose estate he has; so as to control him in the use of his own property in any manner that shall interfere with or defeat an ancient grant thus supposed to have been made. This is the only way of accounting for the common-law principle which gives one neighbor an action against another for making the same use of his property which he has made of his own. And it is a reasonable principle; for it would be exceedingly unjust that successive purchasers or inheritors of an estate for the space of sixty years, with certain valuable privileges attached to it, should be liable to be disturbed by the representatives or successors of those who originally granted, or consented to, or acquiesced in, the use of the privilege.

It is true that of late years the courts in England have sustained actions for the obstruction of such privileges of much shorter duration than sixty years. But the same principle is preserved of the presumption of a grant. And, indeed, the modern doctrine, with respect to easements and privileges, is but a necessary consequence of late decisions, that grants and title deeds may be presumed to have been made, although the title or privilege claimed under them is of a much later date than the ancient time of prescription.

The plaintiff cannot pretend to found his action upon this principle; for he first became proprietor of the land in 1802, and built his home in 1804, ten years before the commencement of his suit. So that, if the presumption of a grant were not defeated by showing the commencement of his title to be so recent, yet there is no case where less than twenty years has entitled a building to the qualities of an ancient building, so as to give the owner a right to the continued use of privileges, the full enjoyment of which necessarily trenches upon his neigh-



bor's right to use his own property in the way he shall deem most to his advantage. A man who purchases a house, or succeeds to one, which has the marks of antiquity about it, may well suppose that all its privileges of right appertain to the house; and, indeed, they could not have remained so long without the culpable negligence or friendly acquiescence of those who might originally have had a right to hinder or obstruct them. But a man who himself builds a house adjoining his neighbor's land ought to foresee the probable use by his neighbor of the adjoining land, and, by convention with his neighbor or by a different arrangement of his house, secure himself against future interruption and inconvenience.

This seems to be the result of the cases anciently settled in England, upon the substance of nuisance or interruption of privileges and easements; and it seems to be as much the dictate of common sense and sound reason as of legal authority.

The decisions cited by the counsel for the plaintiff in support of this action generally go to establish only the general principle that a remedy lies for one who is injured consequentially by the acts of his neighbor done on his own property. The civil-law doctrine cited from Domat will be found, upon examination, to go no further than the common law upon the subject. For, although it is there laid down that new works on a man's ground are prohibited, provided they are hurtful to others who have a right to hinder them; and that the person erecting them shall restore things to their former state and repair the damages; from whence, probably, the common-law remedy of abating a nuisance as well as recovery of damages; yet this is subsequently explained and qualified in another part of the same chapter, where it is said that, if a man does what he has a right to do upon his own land, without trespassing upon any law, custom, title or possession, he is not liable to damages for injurious consequences, unless he does it, not for his own advantage, but maliciously; and the damages shall be considered as casualties for which he is not answerable.

The common law has adopted the same principle, considering the actual enjoyment of an easement for a long course of years as establishing a right which cannot with impunity be impaired by him who is the owner of the land adjoining.

The only case cited from common-law authorities, tending to show that a mere priority of building operates to deprive the tenant of an adjoining lot of the right of occupying and using it at his pleasure, without being subjected to damages, if by such use he should injure a building previously erected, is that of *Slingsby v. Barnard*, 1 Rolle, 430. Sir John Slingsby brought his action on the case against Barnard and Ball, and declared that he was seized of a dwelling-house *nuper edificatus*, and that Barnard was seized of a house next adjoining; and that Barnard, and Ball under him, in making a cellar under Barnard's house,

dug so near the foundation of the plaintiff's house that they undermined the same, and one-half of it fell. Judgment upon this declaration was for the plaintiff, no objection having been made as to the right of action, but only to the form of the declaration.

The report of this case is very short and unsatisfactory; it not appearing whether the defendant confined himself in his digging to his own land, or whether the house then lately built was upon a new or an old foundation. Indeed, it seems impossible to maintain that case upon the facts made to appear in the report, without denying principles which seem to have been deliberately laid down in other books, equally respectable as authorities.

Thus, in *Sid. 167*, upon a special verdict the case was thus: A., having a certain quantity of land, erected a new house upon part of it, and leased the house to B. and the residue of the land to C., who put logs and other things upon the land adjoining said house, so that the windows were darkened, etc. It was holden that B. could maintain case against C. for this injury. But the reason seems to be, that C. took his lease seeing that the house was there, and that he should not, any more than the lessor, render the house first leased less valuable by his obstructions. It was, however, decided in the same case, that, if one seized of land lease forty feet of it to A. to build upon, and another forty feet to B. to build upon, and one builds a house, and then the other digs a cellar upon his ground, by which the wall of the first house adjoining falls, no action lies; and so, they said, it was adjudged in *Shewry v. Piggott*, *W. Jones*, 145, for each one may make what advantage he can of his own. The principle of this decision is, that both parties came to the land with equal rights in point of time and title; and that he who first built his house should have taken care to stipulate with his neighbor, or to foresee the accident and provide against it by setting his house sufficiently within his line to avoid the mischief. In the same case it is stated, as resolved by the court, that, if a stranger have the land adjoining to a new house, he may build new houses, etc., upon his land, and the other shall be without remedy when the lights are darkened; otherwise, when the house first built was an ancient one.

In *Rolle, Abr. 565*, A., seized in fee of copyhold estate, next adjoining land of B., erects a new house upon his copyhold land, and a part is built upon the confines next adjoining the land of B., and B. afterwards digs his land so near the house of A., but on no part of his land, that the foundation of the house, and even the house itself, fall; yet no action lies for A. against B., because it was the folly of A. that he built his house so near to the land of B. For by his own act he shall not hinder B. from the best use of his own land that he can. And after verdict, judgment was arrested. The reporter adds, however, that it seems that a man, who has land next adjoining my land, cannot dig his land

so near mine as to cause mine to slide into the pit; and, if an action be brought for this, it will lie.

Although, at first view, the opinion of Rolle seems to be at variance with the decision which he has stated, yet they are easily reconciled with sound principles. A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor. For, in so placing the house, the neighbor was in fault, and ought to have taken better care of his interest.

If this be the law, the case before us is settled by it; and we have not been able to discover that the doctrine has ever been overruled, nor to discern any good reason why it should be.

The plaintiff purchased his land in 1802. At that time the inhabitants of Boston were in possession and the owners of the adjoining land now owned by the defendants. The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril; for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbor at a convenient distance from him. He could not have maintained an action for obstructing the light or air; because he should have known that, in the course of improvements on the adjoining land, the light and air might be obstructed. It is, in fact, *damnum absque injuria*.

By the authority above cited, however, it would appear that for the loss of, or injury to, the soil merely, his action may be maintained. The defendants should have anticipated the consequences of digging so near the line; and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damage arising from his putting his house in a dangerous position.

## CHAPTER XIX.

## TITLES OTHER THAN BY GRANT.

## Lobdell v. Hayes et al.

Decision by the Supreme Judicial Court of Massachusetts, November Term, 1858. Opinion by Thomas, J.

*(Reported in 12 Gray, 236.)*

Upon the decease of the owner of real estate, it descends to and vests in his heirs at law, unless otherwise disposed of by his will. It vests in his heirs, however, subject to the payment of his debts. But until a sale is lawfully made for that purpose, the heirs may enter upon the estate and receive the rents and profits. Their interest is determined only by the sale. *Gibson v. Farley*, 16 Mass. 287; *Boynton v. Railroad Co.*, 4 Cush. 467.

This is true also of the estate in which the deceased had an equitable interest, which he had purchased of the city of Boston, upon which he had erected dwelling-houses, and of which he was in possession at the time of his death. *R. S.*, c. 61, § 1; *Id.*, c. 74, §§ 8-14; *Reed v. Whitney*, 7 Gray, 533.

The real estate of Lobdell was disposed of by his last will and testament. In the portion devised in trust for his daughters, the heirs at law, as such, have of course no interest. But, in relation to so much as was devised to the widow, she, as she had a legal right to do, waived the provisions of the will. Of this estate there is no devise over. The devise fails, and the estate descends as intestate estate to the heirs at law.

The plaintiff is one of three heirs at law who take the estate devised to the widow, and the devise of which fails by her waiver of the provisions of the will. The plaintiff would therefore be entitled to the possession of one-third of such estate, or of the rents and profits of one-third, until the same is sold for the payment of debts; that is to say, she is entitled under the facts agreed to one-third of one-half of the rents received by the administrators, subject to the deductions hereafter stated.

By the agreed statement of facts it appears that the administrators, in the collection of the rents and in the management and care of the estates, acted as the agents of all the parties in interest. And from the amount to be accounted for as rents are first to be deducted the sums expended for repairs upon the real estate, for interest upon the mortgages, for taxes and insurance, and a reasonable compensation to the administrators for their services in the care of the estates and collection of the rents.

As to the rents received from the houses in Medford Court, they must be held to abide the decision in the suit of *Montague v. Lobdell*.

The demand of the widow upon the administrators for dower was of no avail, so far, at any rate, as it applied to the estates which, by her waiver of the provisions of the will, descended to the heirs at law, and no deduction is to be made from the plaintiff's share on that account.

If the parties are unable to agree upon the amount to be paid to the plaintiff under the rules above stated, the case must be sent to an assessor to fix the amount. ¶

Judgment for the plaintiff.

### Kohl et al. v. United States.

Decision by Supreme Court of the United States, October, 1875. Opinion by Strong, J.

*(Reported in 91 U. S. 367.)*

It has been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the states for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen. This cannot be. No one doubts the existence in the state governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. *Vatt.*, c. 20, § 34; *Bynk.*, lib. 2, c. 15; *Kent*, Comm. 338-340; *Cooley*, Const. Lim. 584 *et seq.* But it is no more necessary for the exercise of the

powers of a state government than it is for the exercise of the conceded powers of the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the federal government, it is a right which may be exercised within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the constitution. In *Ableman v. Booth*, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power ought not to be questioned. The constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion that, on making just compensation, it may be taken? In *Cooley*, Const. Lim. 526, it is said: "So far as the general government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions,—as must sometimes be necessary in the case of forts, light-houses, and military posts or roads, and other conveniences and necessities of government,—the general government may exercise the authority as well within the states as within the territory under its exclusive jurisdiction; and its right to do so may be supported by the same reasons which support the right in any case: that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or of any other authority." We refer also to *Trombley v. Humphrey*, 23 Mich. 471; 10 Pet. 723; *Dickey v. Turnpike Co.*, 7 Dana, 113; *McCullough v. Maryland*, 4 Wheat. 429.

It is true, this power of the federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the states, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the states. Such was the ruling in *Gilmer v. Lime Point*, 18 Cal. 229, where lands were condemned by a proceeding in a state court and under a state law for a United States fortification. A similar decision was made in *Burt v. Insurance Co.*, 106 Mass. 356, where land was taken under a state law as a site for a postoffice and sub-treasury building. Neither of these cases denies the right of the federal government to have lands in the states condemned for its uses under its own power and by its own action. The question was, whether the state could take lands for any other public use than that of the state. In *Trombley v. Humphrey*, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right, and by virtue of its own eminent domain. The act of congress of March 2, 1872 (17 Stat. 39), gave authority to the secretary of the treasury to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, postoffice, internal-revenue and pension offices, at a cost not exceeding \$300,000; and a proviso to the act declared that no money should be expended in the purchase until the state of Ohio should cede its jurisdiction over the site, and relinquish to the United States the right to tax the property. The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. It is true, the words "to purchase" might be construed as including the power to acquire by condemnation; for, technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition

by contract between the parties, without governmental interference. That congress intended more than this is evident, however, in view of the subsequent and amendatory act passed June 10, 1872, which made an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for the building. These provisions, connected as they are, manifest a clear intention to confer upon the secretary of the treasury power to acquire the grounds needed by the exercise of the national right of eminent domain, or by private purchase, at his discretion. Why speak of condemnation at all, if congress had not in view an exercise of the right of eminent domain, and did not intend to confer upon the secretary the right to invoke it?

But it is contended on behalf of the plaintiffs in error that the circuit court had no jurisdiction of the proceeding. There is nothing in the acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the circuit court to secure it. Doubtless congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the circuit court; but this, we think, was not necessary. The investment of the secretary of the treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The judiciary act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of any act of congress, are plaintiffs. If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the circuit court. That it is a "suit" admits of no question. In *Weston v. Charleston*, 2 Pet. 464, Chief Justice Marshall, speaking for this court, said: "The term ['suit'] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit." A writ of prohibition has, therefore, been held to be a suit; so has a writ of right, of which the circuit court has jurisdiction (*Green v. Lister*, 8 Cranch, 229); so has *habeas corpus*. *Holmes v. Jamieson*, 14 Pet. 564. When, in the eleventh section of the judiciary act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized



as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi-judicial*. Certainly no other mode than a judicial trial has been provided.

It is argued that the assessment of property for the purpose of taking it is in its nature like the assessment of its value for the purpose of taxation. It is said they are both valuations of the property to be made as the legislature may prescribe, to enable the government, in the one case, to take the whole of it, and in the other to take a part of it for public uses; and it is argued that no one but congress could prescribe in either case that the valuation should be made in a judicial tribunal or in a judicial proceeding, although it is admitted that the legislature might authorize the valuation to be thus made in either case. If the supposed analogy be admitted, it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. This is left to the ordinary processes of the law; and hence, as the government is a suitor for the property under a claim of legal right to take it, there appears to be no reason for holding that the proper circuit court has not jurisdiction of the suit, under the general grant of jurisdiction made by the act of 1789.

The second assignment of error is, that the circuit court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lessees of one of the parcels sought to be taken, and they demand a separate trial of the value of their interest; but the court overruled the demand, and required that the jury should appraise the value of their lot or parcel, and that the lessees should in the same trial try the value of their leasehold estate therein. In directing the course of the trial, the court required the lessor and the lessees each separately to state the nature of their estates to the jury, the lessor to offer his testimony separately, and the lessees theirs, and then the government to answer the

testimony of the lessor and the lessees; and the court instructed the jury to find and return separately the value of the estates of the lessor and the lessees. It is of this that the lessees complain. They contend that whether the proceeding is to be treated as founded on the national right of eminent domain, or on that of the state, its consent having been given by the enactment of the state legislature of February 15, 1873 (70 Ohio Laws, p. 36, § 1), it was required to conform to the practice and proceedings in the courts of the state in like cases. This requirement, it is said, was made by the act of congress of June 1, 1872. 17 Stat. 522. But, admitting that the court was bound to conform to the practice and proceedings in the state courts in like cases, we do not perceive that any error was committed. Under the laws of Ohio, it was regular to institute a joint proceeding against all the owners of lots proposed to be taken (*Giesy v. Railroad Co.*, 4 Ohio St. 308); but the eighth section of the state statute gave to "the owner or owners of each separate parcel" the right to a separate trial. In such a case, therefore, a separate trial is the mode of proceeding in the state courts. The statute treats all the owners of a parcel as one party, and gives to them collectively a trial separate from the trial of the issues between the government and the owners of other parcels. It hath this extent; no more. The court is not required to allow a separate trial to each owner of an estate or interest in each parcel, and no consideration of justice to those owners would be subserved by it. The circuit court, therefore, gave to the plaintiffs in error all, if not more than all, they had a right to ask. The judgment of the circuit court is affirmed.

Mr. Justice Field (dissenting). Assuming that the majority are correct in the doctrine announced in the opinion of the court,—that the right of eminent domain within the states, using those terms not as synonymous with the ultimate dominion or title to property, but as indicating merely the right to take private property for public uses, belongs to the federal government, to enable it to execute the powers conferred by the constitution,—and that any other doctrine would subordinate, in important particulars, the national authority to the caprice of individuals or the will of state legislatures, it appears to me that provision for the exercise of the right must first be made by legislation. The federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property; and I do not find any statute of congress conferring upon them such authority. The judiciary act of 1789 only invests the circuit courts of the United States with jurisdiction, concurrent with that of the state courts, of suits of a civil nature at common law or in equity; and these terms have reference to those classes of cases which are conducted by regular pleadings between parties, according to the established doctrines prevailing at the time in the jurisprudence of England. The proceeding to ascertain

the value of property which the government may deem necessary to the execution of its powers, and thus the compensation to be made for its appropriation, is not a suit at common law or in equity, but an inquisition for the ascertainment of a particular fact as preliminary to the taking; and all that is required is that the proceeding shall be conducted in some fair and just mode, to be provided by law, either with or without the intervention of a jury, opportunity being afforded to parties interested to present evidence as to the value of the property, and to be heard thereon. The proceeding by the states, in the exercise of their right of eminent domain, is often had before commissioners of assessment or special boards appointed for that purpose. It can hardly be doubted that congress might provide for inquisition as to the value of property to be taken by similar instrumentalities; and yet, if the proceeding be a suit at common law, the intervention of a jury would be required by the seventh amendment to the constitution.

I think that the decision of the majority of the court in including the proceeding in this case under the general designation of a suit at common law, with which the circuit courts of the United States are invested by the eleventh section of the judiciary act, goes beyond previous adjudications and is in conflict with them.

Nor am I able to agree with the majority in their opinion, or at least intimation, that the authority to purchase carries with it authority to acquire by condemnation. The one supposes an agreement upon valuation and a voluntary conveyance of the property: the other implies a compulsory taking and a contestation as to the value. *Beekman v. Railroad Co.*, 3 Paige, 75; *Railroad Co. v. Davis*, 2 Dev. & B. 465; *Will-yard v. Hamilton*, 7 Ham. (Ohio), 453; *Livingston v. Mayor, etc.*, 7 Wend. 85; *Koppikus v. Commissioners*, 16 Cal. 249.

For these reasons, I am compelled to dissent from the opinion of the court.

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## CHAPTER XX.

### TITLE BY GRANT.

#### **Moore v. Robbins.**

Decision by the Supreme Court of the United States, October, 1877.

Opinion by Miller, J.

*(Reported in 96 U. S. 530.)*

This case is brought before us by a writ of error to the supreme court of the state of Illinois.

In its inception it was a bill in the circuit court for De Witt county to foreclose a mortgage given by Thomas I. Bunn to his brother, Lewis

Bunn, on the south half of the southeast quarter and the south half of the southwest quarter of section 27, township 19, range 3 east, in said county. In the progress of the case the bill was amended so as to allege that C. H. Moore and David Davis set up some claim to the land; and they were made defendants and answered.

Moore said that he was the rightful owner of forty acres of the land mentioned in the bill and mortgage, to wit, the southwest quarter of the southwest quarter of said section, and had the patent of the United States giving him title to it.

Davis answered that he was the rightful owner of the southeast quarter of said southwest quarter of section 27. He alleges that John P. Mitchell bought the land at the public sale of lands ordered by the president for that district, and paid for it, and had the receipt of the register and receiver, and that it was afterwards sold under a valid judgment and execution against Mitchell, and the title of said Mitchell came by due course of conveyance to him, said Davis.

It will thus be seen that, while Moore and Davis each assert title to a different forty acres of land covered by Bunn's mortgage to his brother, neither of them claims under or in privity with Bunn's title, but adversely to it.

But as both parties assert a right to the land under purchases from the United States, and since their rights depend upon the laws of the United States concerning the sale of its public lands, there is a question of which this court must take cognizance.

As regards Moore's branch of the case, it seems to us free from difficulty.

The evidence shows that the forty acres which he claims was struck off to him at a cent or two over \$2.50 per acre, at a public land sale, by the officers of the land district at Danville, Illinois, November 15, 1855; that his right to it was contested before the register and receiver by Bunn, who set up a prior pre-emption right. Those officers decided in favor of Bunn, whereupon Moore appealed to the commissioner of the general land office, who reversed the decision of the register and receiver, and on this decision a patent for the land was issued to Moore, who has it now in his possession.

Some time after this patent was delivered to Moore, Bunn appealed from the decision of the commissioner to the secretary of the interior, who reversed the commissioner's decision and confirmed that of the register and receiver, and directed the patent to Moore to be recalled, and one to issue to Bunn. But Moore refused to return his patent, and the land department did not venture to issue another for the same land; and so there is no question but that Moore is vested now with the legal title to the land, and was long before this suit was commenced. Nor is there, in looking at the testimony taken before the register and receiver and that taken in the present suit, any just foundation for

Bunn's pre-emption claim. We will consider this point more fully when we come to the Davis branch of the case.

Taking this for granted, it follows that Moore, who has the legal title, is in a suit in chancery decreed to give it up in favor of one who has neither a legal nor an equitable title to the land.

The supreme court of Illinois, before whom it was not pretended that Bunn had proved his right to a pre-emption, in their opinion in this case place the decree by which they held Bunn's title paramount to that of Moore on the ground that to the officers of the land department, including the secretary of the interior, the acts of congress had confided the determination of this class of cases; and the decision of the secretary in favor of Bunn, being the latest and the final authoritative decision of the tribunal having jurisdiction of the contest, the courts are bound by it, and must give effect to it. *Robbins v. Bunn*, 54 Ill. 48.

Without now inquiring into the nature and extent of the doctrine referred to by the Illinois court, it is very clear to us that it has no application to Moore's case. While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the land department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the executive department of the government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public lands; and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the president, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance

of the land as to individuals; and if the government is the party injured, this is the proper course.

"A patent," says the court in *United States v. Stone*, 2 Wall. 525, "is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England, this was originally done by *scire facias*; but a bill in chancery is found a more convenient remedy." See also *Hughes v. United States*, 4 Wall. 232, 11 How. 552.

If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him.

But in all this there is no place for the further control of the executive department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the president and sealed and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.

If such a power exists, when does it cease? There is no statute of limitations against the government; and if this right to reconsider and annul a patent after it has once become perfect exists in the executive department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the land department is utterly inconsistent with the universal principle on which the right of private property is founded.

The order of the secretary of the interior, therefore, in Moore's case, was made without authority and is utterly void, and he has a title perfect both at law and in equity.

The question presented by the forty acres claimed by Davis is a very different one. Here, although the government has twice sold the land to different persons and received the money, it has issued no patent to either, and the legal title remains in the United States. It is not denied, however, that to one or the other of the parties now before the court this title equitably belongs; and it is the purpose of the present suit to decide that question.

The evidence shows that on the same day that Moore bought at the

public land sale the forty acres we have just been considering, Mitchell bought in like manner the forty acres now claimed by Davis, to wit, November 15, 1855. He paid the sum at which it was struck off to him at public outcry, and received the usual certificate of purchase from the register and receiver. On the 20th day of February, 1856, more than three months after Mitchell's purchase, Thomas I. Bunn appeared before the same register and receiver and asserted a right, by reason of a pre-emption commenced on the 8th day of November, 1855, to pay for the south half of the southwest quarter and the south half of the southeast quarter of section 27, which includes both the land of Moore and Davis in controversy in this suit, and to receive their certificates of purchase. They accepted his money and granted his certificate. A contest between Bunn on the one side and Moore and Mitchell on the other, as to whether Bunn had made the necessary settlement, was decided by those officers in favor of Bunn; and on appeal, as we have already shown, to the commissioner, this was reversed, and finally the secretary of the interior, reversing the commissioner, decided in favor of Bunn. But no patent was issued to Mitchell after the commissioner's decision, as there was to Moore; and the secretary, therefore, had the authority undoubtedly to decide finally for the land department who was entitled to the patent. And though no patent has been issued, that decision remains the authoritative judgment of the department as to who has the equitable right to the land.

The supreme court of Illinois, in their opinion in this case, come to the conclusion that this final decision of the secretary is not only conclusive on the department, but that it also excludes all inquiry by courts of justice into the right of the matter between the parties.

The whole question, however, has been since that time very fully reviewed and considered by this court in *Johnson v. Towsley*, 13 Wall. 72. The doctrine announced in that case, and repeated in several cases since, is this:

That the decision of the officers of the land department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief.

In the recent case of *Shepley v. Cowan*, 91 U. S. 340, the doctrine is thus aptly stated by Mr. Justice Field: "The officers of the land department are specially designated by law to receive, consider and pass

upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department."

Applying to the case before us these principles, which are so well established and so well understood in this court as to need no further argument, we are of opinion, if we take as proved the sufficiency of the occupation and improvement of Bunn as of the date which he alleged, his claim is fatally defective in another respect in which the officers of the land department were mistaken as to the law which governed the rights of the parties, or entirely overlooked it.

In the recent case of *Atherton v. Fowler*, 96 U. S. 513, we had occasion to review the general policy and course of the government in disposing of the public lands, and we stated that it had formerly been, if it is not now, a rule of primary importance to secure to the government the highest price which the land would bring by offering it publicly at competitive sales, before a right to any part of it could be established by private sale or by pre-emption. In the enforcement of this policy, the act of September 14, 1841, which for the first time established the general principle of pre-emption, and which has remained the basis of that right to this day, while it allowed persons to make settlements on the public lands as soon as the surveys were completed and filed in the local offices, affixed to such a settlement two conditions as affecting the right to a pre-emption. One of these was that the settler should give notice to the land office of the district, within thirty days after settlement, of his intention to exercise the right of pre-emption, and the other we will give in the language of the fourteenth section of that act:

"This act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the proclamation of the president, nor shall any of the provisions of this act be available to any person who shall fail to make the proof of payment and file the affidavit required before the commencement of the sale aforesaid." 5 Stat. 457.

There can be no misconstruction of this provision, nor any doubt that it was the intention of congress that none of the liberal provisions of that act should stand in the way of a sale at auction of any of the public lands of a given district where the purchase had not been completed by the payment of the price before the commencement of the sales ordered by the president's proclamation. We do not decide, be-



cause we have not found it necessary to do so, whether this provision is applicable under all the pre-emption laws passed since the act of 1841, though part of it is found in the Revised Statutes (section 2382), as part of the existing law. But we have so far examined all those laws enacted prior to November, 1855, the date of Mitchell's purchase, as to feel sure it was in full operation at that time. The act of March 3, 1853, extending the right of pre-emption to the alternate sections, which the government policy reserved in its numerous grants to railroads and other works of internal improvement, required the pre-emptor to pay for them at \$2.50 per acre, before they should be offered at sale at public auction. 10 Stat. 244. This was only two years and a half before these lands were sold to Mitchell, and they were parts of an alternate section reserved in a railroad grant. That statute, in its terms, was limited to persons who had already settled on such alternate sections, and it may be doubted whether any right of pre-emption by a settlement made afterwards existed under the law. But it is unnecessary to decide that point, as it is beyond dispute that it required in any event that the money should be paid before the land was offered for sale at public auction.

The record of this case shows that while Bunn's pre-emption claim comes directly within the provisions of both statutes, they were utterly disregarded in the decision of the secretary of the interior, on which alone this case has foundation.

We have no evidence in this record at what time the president's proclamation was issued, or when the sales under it began at which Mitchell purchased. The proclamations are not published in the statutes as public laws, and this one is not mentioned in the record. But we know that the public lands are never offered at public auction until after a proclamation fixing a day when and the place where the sales begin. The record shows that both Moore and Mitchell bought and paid for the respective forty-acre pieces now in contest, at public auction. That they were struck off to them a few cents in price above the minimum of \$2.50, below which these alternate sections could not be sold, and that this was on the 15th day of November, 1855. These public sales were going on then on that day, and how much longer is not known, but it might have been a week, or two weeks, as these sales often continue open longer than that.

Bunn states in his application, made three months after this, that his settlement began on the 8th of November, 1855. It is not apparent from this record that he ever gave the notice of his intention to pre-empt the land, by filing what is called a declaration of that intention in the land office. There is a copy of such a declaration in the record accompanying the affidavit of settlement, cultivation and qualification required of a pre-emptor, which last paper was made and sworn to February 20, 1856, when he proved up his claim, and paid for and received his

certificate. There is nothing to show when the declaration of intention was filed in the office.

Waiving this, however, which is a little obscure in the record, it is very clear that Bunn "failed to make proof of payment, and failed to file the affidavit of settlement required, before the commencement of the sale" at which Mitchell bought. The statute declares that none of the provisions of the act shall be available to any person who fails to do this. The affidavit and payment of Bunn was made three months after the land sales had commenced, and after these lands had been sold.

The section also declares that the act shall not delay the sale of any public land beyond the time which has been or may be appointed by the proclamation of the president. To refuse Mitchell's bid on account of any supposed settlement, even if it had been brought to the attention of the officers, would have been to delay the sale beyond the time appointed, and would, therefore, have been in violation of the very statute under which Bunn asserts his right.

Whatever Bunn may have done on the 8th of November, and up to the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public auction, unless he had also paid or offered to pay the price before the sales commenced.

It seems quite probable that such attempt at settlement as he did make was made while the land sales were going on, or a few days before they began, with the purpose of preventing the sale, in ignorance of the provision of the statute which made such attempt ineffectual.

At all events, we are entirely satisfied that the lands in controversy were subject to sale at public auction at the time Moore and Mitchell bid for and bought them; that the sale so made was by law a valid one, vesting in them the equitable title, with right to receive the patents; and that the subsequent proceedings of Bunn to enter the land as a pre-emptor were unlawful and void.

It was the duty of the court in Illinois, sitting as a court of equity, to have declared that the mortgage made by Bunn, so far as these lands are concerned, created no lien on them, because he had no right, legal or equitable, to them.

The decree of the supreme court of that state must be reversed, and the cause remanded to that court for further proceedings in accordance with this opinion; and it is so ordered.

## CHAPTER XXI.

## TITLE BY PRIVATE GRANT.

**Havens v. Sea Shore Land Co.**

Decision by Court of Chancery of New Jersey, October 21, 1890. Opinion by Van Fleet, V. C.

*(Reported in 47 N. J. Eq. 365.)*

This is a partition suit. The title to one of the tracts which the complainants seek to have divided is in dispute. The defendant asserts title to the whole tract. The complainants, on the other hand, assert a title to the undivided half of it, but admit that the defendant has title to an undivided fourth, and that the title to the other undivided fourth is in certain other persons. The defendant exhibits a paper title to the whole tract. The important question, therefore, presented for decision is, Is the title exhibited by the defendant valid? For, if it is, the bill, as against the defendant, as to that tract, must be dismissed. Both parties claim under David Curtis, who died intestate between 1783 and 1788. At the time of his death he owned two undivided sevenths of Manasquan beach, one of which he acquired from Elisha Lawrence by deed dated July, 1770, and the other from Benjamin Lawrence by a deed which it is alleged is lost. Among the gifts made by David Curtis by his will, there is one which reads, in substance, as follows: "I give and devise unto my eldest son, Elisha, that right of beach I bought of Elisha Lawrence,—to him, and the heirs of his body lawfully begotten; and, for the want of such heir or heirs, then to be equally divided between my two sons John and Benjamin." David Curtis, besides limiting over to his two sons John and Benjamin the land devised to his son Elisha, made John and Benjamin his residuary devisees, and they, as such devisees, took that undivided seventh of Manasquan beach which had been conveyed to their father by Benjamin Lawrence. The thing in dispute is the one-half of that seventh which David Curtis acquired from Elisha Lawrence, and which he, by his will, limited over to his son John, in case his son Elisha, for the want of heirs of his body, did not take it. The defendant claims this half, and puts forward as the foundation of its title a deed purporting to have been made on the 31st day of May, 1788, by John Curtis to Joseph Lawrence. The whole contest between the parties centers in this deed. If it passed the land in controversy, the defendant will be entitled to prevail in this suit. If it did not, the complainants will be entitled to the decree they ask. The complainants contend—*First*, that the deed has not been sufficiently proved to entitle it to be ad-

mitted in evidence; and, *secondly*, that if it was admitted, no effect could be given to it (1) for the want of apt words to pass any right or estate which the grantor may have held at the time of its execution, and (2) because the grantor then held no right or estate in the land which he could grant or convey. These questions will be considered in an order directly the reverse of that in which they have just been stated. It is undisputed that Elisha Curtis, the eldest son of David, died childless, never having had issue of his body. John died before Elisha. Their deaths occurred very near together in point of time, but the proof makes it entirely clear that John died first, so that it was undetermined when John died whether or not Elisha would have issue of his body. As the law stood when the devise to Elisha took effect, it is clear that he took an estate tail in the land devised. Our statute cutting an estate tail down to an estate for life in the first taker, with remainder in fee to the issue of his body, was not passed until 1820 (Elmer. Dig., p. 130, pt. 6), and the devise to Elisha took effect prior to 1788. Chief Justice Kirkpatrick stated with great clearness, in *Den v. Taylor*, 5 N. J. Law, 413, 417, what words would be held to be sufficient to create an estate tail. He said: "It is as well settled that a devise to one and his heirs, and, if he die without issue, then over to another, creates an estate tail, as if the principal devise had been, in the most technical language, to him and the heirs of his body. The words of the devise over, 'if he die without issue, then over to another,' limit the generality of the terms 'heirs' in the principal devised, and lead us to the inevitable conclusion that the testator intended heirs of the body only, and not heirs generally. And whenever this intention can be collected from the whole will, taken together, let the phraseology in the particular clauses of it be what it may, it has been always construed to make an estate tail." This statement of the law has been so uniformly followed by the courts of this state as to have become a canon of real-property law. *Moore v. Rake*, 26 N. J. Law, 574, 585. It is entirely clear that Elisha Curtis took an estate tail in the land in controversy. This being so, it necessarily follows that the devise over to John and Benjamin, in case Elisha did not have issue of his body, gave them a vested remainder in fee, subject to be defeated by the birth of issue to Elisha. The law is settled that a remainder limited upon an estate tail will be held to be vested, though it is uncertain whether a right to possession will ever vest in the remainderman.

The decision of the court of errors and appeals in *Moore v. Rake*, 26 N. J. Law, 574, is directly in point, and furnishes an authoritative illustration of the manner in which this principle of law is to be applied. The devise in that case took effect in 1795, and was expressed substantially in this form: "I give to my son Isaac, his heirs and assigns, all my lands whereon I now live, to hold to him, his heirs and assigns, forever; but, if my son Isaac should die without lawful issue, then I give

my land to my wife, her heirs and assigns, forever." The testator's son Isaac died in 1843, without issue, never having been married. His mother, the testator's widow, died in 1832, over ten years before Isaac. The controverted question in the case was what estate the testator's wife took under the devise. The court held that she took a vested remainder, and not by way of an executory devise, nor a contingent remainder. Each of the three judges who wrote opinions — Chancellor Williamson, and Justices Elmer and Vredenburg — so expressly declared. Justice Vredenburg (page 586) gave the following summary of the leading rules distinguishing a vested from a contingent remainder: "An estate is vested when there is a present fixed right of present or future enjoyment. The law favors the vesting of remainders, and does it at the first opportunity. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. It is the uncertainty of the right which renders a remainder contingent, not the uncertainty of the actual enjoyment. A remainder limited upon an estate tail is held to be vested, though it is uncertain if the possession will ever take place." There can, therefore, be no doubt that John Curtis, by force of the devise to him, took a vested remainder in fee in the land in controversy, and it is equally certain, if such was the character of his estate, that he had good right and full power to make an effectual conveyance of it during the life of his brother Elisha.

If a different conclusion had been reached as to the nature of John's estate, and it had been found that the remainder limited to him was contingent, still I think the court would have been bound to declare, in conformity to the well-settled law on this subject, that he had full power, during the life of Elisha, to make an effectual conveyance of his estate in the land, though it was uncertain whether such estate would ever vest in possession. All contingent estates of inheritance, or possibilities coupled with an interest, where the person who is to take is certain, may be conveyed or devised before the contingency on which they depend happens. In *Ackerman's Adm'r's v. Vreeland's Ex'r*, 14 N. J. Eq. 23, 29, Chancellor Green said: "It may be relied on as a rule that every interest in lands, however remote the possibility is, may be released." The law on this subject, as stated by Sergeant Williams in his note to *Purefoy v. Rogers*, 2 Saund. 388, and adopted by the supreme court in *Den v. Manners*, 20 N. J. Law, 142, 145, and restated approvingly by Justice Vredenburg in *Moore v. Rake*, 26 N. J. Law, 593, is this: "It seems now to be established, notwithstanding some old opinions to the contrary, that contingent and executory estates, and possibilities accompanied by an interest, are descendible to the heir, or transmissible to the representative, of a person dying, or may be granted, assigned or devised by him, before the contingency upon which they depend takes effect." These authorities make it plain that the first

question must be decided in favor of the defendant. At the date of the deed which the defendant puts forward as the foundation of its title, there can be no doubt that John Curtis had full power to make an effectual conveyance of the land in controversy.

Assuming, for the present, that the deed on trial has been sufficiently proved to entitle it to be admitted in evidence, the next question is, What effect shall be given to it? Did it pass the estate of John Curtis in the land in controversy? Its granting clause is in these words: "Witnesseth, that the said John Curtis, for and in consideration of the just and full sum of sixteen pounds, proclamation money, hath remised, released and forever quitclaimed, and by these presents, for himself and his heirs, doth fully, clearly, and absolutely remise, release, and forever quitclaim, unto the said Joseph Lawrence, all his right, title, interest and property," etc. It will be observed that, although the grant is not made to the grantee and his heirs, it is made by the grantor for himself and his heirs. This language, standing by itself, and in the absence of any words plainly indicating that the estate to be granted was less than a fee, would seem to furnish very cogent evidence that the grantor intended to convey a fee. That such was the intention of the maker of this instrument is put beyond all question by the language of its *habendum*, which is in these words: "To have and to hold the above, [then designating the thing conveyed,] with, all and singular, the privileges and appurtenances thereunto belonging, [reserving liberty to fish and gun,] to the only proper use, benefit and behoof of him, the said Joseph Lawrence, his heirs and assigns forever; so that neither he, the said John Curtis, nor Mercy, his wife, nor their heirs, nor any other person or persons, for themselves, or any other of the name, or in the name, right or stead of any of them, shall or will, by any way or means, hereafter claim, challenge or demand any right, title or interest of, in or to the said right, or any part or parcels thereof." Where the granting clause of a deed is silent as to the estate intended to be conveyed, resort may be had to the *habendum* to ascertain the intention of the grantor in that regard. It cannot be used either to enlarge or diminish the estate specifically defined in the granting clause, for if it is repugnant to that clause it is void; but if that clause is either silent or ambiguous, then the *habendum* becomes the standard by which the estate granted must be measured. The chief justice, speaking for the court of errors and appeals, in *Gravel Co. v. Newell*, 53 N. J. Law, 412, 19 Atl. R. 209, said: "The well-settled rule is that, if the granting part of the conveyance does not, by clear and definite terms, conclude the question, this clause, [the *habendum*,] whose office is to define the extent of the ownership granted, may be resorted to. It may be used to explain, but not to vary or control, the premises." And Justice Dupue, in speaking for the same court, in *Melick v. Pidcock*, 44 N. J. Eq. 525, 540, 15 Atl. R. 3, said: "To create a fee the limitation must be to heirs:

but it may be made either in direct terms or by immediate reference, and it is not essential that the word 'heirs' be located in any particular part of the grant." No doubt can be entertained that, if this instrument passed anything, it passed a fee.

But it is further said that the deed on trial contains no words of conveyance, but merely words of release, and as the defendant has admitted by its answer that, so far as it has been able to discover, the person to whom the release was made was, at the date of its execution, without right of any kind in the land released, the release must, as a matter of law, be adjudged to be without legal force. Both of the propositions of fact upon which this contention rests appear to be true. The operating or essential words of the deed are "remise, release and quitclaim," and it is also true that the defendant admits that the person to whom the deed was made was, at the date of its execution, without right in the land released; but, as I understand the law, it does not follow that the deed, for these reasons, must be adjudged to be nugatory. On the contrary, I think the law from the earliest times has made it the duty of the courts in all cases, where it appeared that the deed put on trial was founded on a valuable consideration, and there was no reason to declare that it had been unfairly obtained, to sustain it and carry it into effect, if by law it were possible to do so. More than a century ago Lord Mansfield said: "The rules laid down in respect of the construction of deeds are founded in law, reason and common sense, that they shall operate according to the intention of the parties if by law they may; and, if they cannot operate in one form, they shall operate in that which by law will effectuate the intention." *Goodtitle v. Bailey*, Cowp. 597, 600. And in *Sheppard's Touchstone* the same doctrine is stated in this wise: "A deed that is intended and made to one purpose may inure to another; for, if it will not take effect that way, it is intended it may take effect another way. And therefore a deed made and intended for a release may amount to a grant of a reversion, an attornment or a surrender, or *e converso*. And if a man have two ways to pass lands by the common law, and he intended to pass them one way, and they will not pass that way, in that case, *ut res valeat*, they may pass the other way." (1st Amer. Ed. 82.) Judge Hare, in his notes to *Roe v. Tranmarr*, Wiles, 682, 2 Wils. 75, says: "Any instrument which shows that a title was meant to be given in return for value received will be equally effectual with the most formal deed; words to raise a use, and a consideration to support it, being all that is requisite to call the statute of uses into operation, and constitute a bargain and sale. A deed which has failed of effect as a release, from the want of an estate in possession in the releasee, or as a feoffment, from want of livery of seisin, may consequently be rendered valid as a bargain and sale by the averment and proof of a valuable consideration, although none is expressed in the writing." 2 Smith, Lead. Cas. (8th Amer. Ed.) 534. And Chancellor

Kent, while chief justice of the supreme court of New York, said, in pronouncing the prevailing opinion of that court in *Jackson v. Alexander*, 3 Johns. 484, 492: "The law from the beginning has been very indulgent in helping out deeds on the ground of consideration." And in his Commentaries he said: "Any words that will raise a use will, with a valuable consideration, amount to a bargain and sale." 4 Kent, Comm. 496. These citations render it unnecessary to discuss the question as to what effect shall be given to the deed on trial. They make it clear that it passed the land by way of bargain and sale. The deed shows on its face that it was founded on a valuable consideration paid by the grantee; hence, if the deed shall be admitted in evidence, the fact that a valuable consideration was paid for the land will be established by proof inherent in the deed. No particular form of words is required to raise a use. Any words will be sufficient for that purpose which show an intention to convey. That such was the intention of the maker of this instrument is put beyond dispute by the words of the instrument itself. Effect must be given to the deed as a bargain and sale.

We now come to the question, Has the deed been sufficiently proved to entitle it to be admitted in evidence? It was not acknowledged, but purports to have been executed in the presence of two subscribing witnesses. If it is an honest paper it was executed over one hundred years ago. This great lapse of time puts it out of the power of the defendant to call the subscribing witnesses, or to produce any direct evidence of the authenticity of the signatures of either the subscribing witnesses or the grantor. All persons who could give such evidence we know must have been dead for years. The antiquity of the paper appears to me to be fully established. The paper itself furnishes, as I think, very strong evidence of that fact. Its color and texture show that it is very ancient. Its water-mark indicates that it was made in the reign of one of the Georges. The spelling and style of penmanship are such as distinguish documents written near the beginning of the present century from those written at a more recent date. And the consideration mentioned in it, it will be observed, is expressed in a currency which, as a matter of history, we know was in use about the time the deed purports to have been made. It is undoubtedly true that all these things might exist if the paper had been forged, but there is no proof suggesting even a suspicion of forgery, and the law never presumes either fraud or crime. Besides, it is not to be supposed, as Judge Harper of the court of appeals of South Carolina very pertinently remarked in *Robinson v. Craig*, 1 Hill, 389, 391, that "a deed would be forged with a view to a fraud to be committed at the end of thirty years." The motive which usually leads to crime is the hope of present gain. No motive of that kind existed in this case. Until quite recently the land in controversy was worthless, not capable of being used with profit for any purpose, a mere barren waste, lying between the waters of the



Atlantic ocean and Barnegat bay. Nobody ever had possession of it or exercised any acts of ownership over it until the latter part of 1880, when the defendant built a small house and some fence on it, which it subsequently caused to be removed. From the date of the deed until less than twelve years ago the land was regarded as without present or prospective value. In this state of affairs, it is impossible to believe that anybody would have expended the time and talent requisite in the perpetration of such a complicated forgery simply to place himself in a position where he might set up a claim to a worthless tract of land. But there is other evidence on this point. The deed on trial, it will be remembered, purports to have been made May 31, 1788, by John Curtis to Joseph Lawrence. Joseph Lawrence — Curtis' grantee — conveyed the same land to James Price by deed dated November 16, 1790. This latter deed, though purporting to have been executed in the presence of three subscribing witnesses, is unacknowledged, and the same objections are urged against its admission in evidence that are urged against the admissibility of the other. Joseph Lawrence, in his deed to Price, describes the land which he conveys as that part of Sgan beach "which I bought of John Curtis, which was left to him by his father, David Curtis, deceased, which he bought of Elisha Lawrence, bearing date July 9, 1770." Now, although this description does not say in express words that John Curtis had made a deed to Joseph Lawrence, still I think it says so in substance and effect. What it says in plain words is that Joseph Lawrence had bought the land of John Curtis, and as this was said by Joseph Lawrence in the instrument which he used to transfer the title to the land from himself to another,—in which instrument it will be observed that he describes another transfer of title by almost precisely similar words, namely, "which he bought of Elisha Lawrence, deed bearing date," etc.,—there would seem to be no reason to doubt that what Joseph Lawrence meant by the phrase, "which I bought of John Curtis," and what his grantee understood he meant, was that the title he was conveying was the same title that had been made to him by John Curtis by deed. The phrase "under consideration" amounted, unquestionably, to a direct and positive assertion of title by Joseph Lawrence, and that he had acquired his title from John Curtis. This is sufficient, in my judgment, especially when considered in connection with the proof inherent in the paper itself, to justify the presumption that the deed on trial was in existence on the 16th day of November, 1790, when Lawrence conveyed to Price. A recital in an ancient deed or will of any antecedent deed or document, consistent with its own provisions, will, after the lapse of a long period, be presumptive proof of the former existence of such deed or document, especially in a case where nothing appears to rebut such presumption. *Fuller v. Saxton*, 20 N. J. Law, 61, 65. James Price — Joseph Lawrence's grantee — conveyed the land in question to James Price, Jr., by deed

duly executed and recorded in December, 1813. No allusion, however, was made in this deed to either of the two prior deeds. James Price, Jr., together with his wife, conveyed, in 1836, by a deed executed in due form of law, the land in controversy to James Johnson. A certified copy of this latter deed was put in evidence without objection. It refers, in express terms, to the deed executed November 16, 1790, by Joseph Lawrence to James Price. This reference establishes the antiquity of that deed. It shows that it was in existence more than fifty years ago. In my judgment the antiquity of both deeds is fully established.

But the mere fact that a deed is ancient will not of itself warrant the presumption that it is genuine and entitled to be admitted in evidence. Even according to the English rule, which seems to be somewhat more indulgent than that prevailing in this country, it is required that, in addition to proof of antiquity, there shall be evidence that the deed comes from the proper custody or depository to justify its admission in evidence. Lord Ellenborough, in *Roe v. Rawlins*, 7 East, 279, 291, said: "Ancient deeds, proved to have been found among deeds and evidences of land, may be given in evidence, although the execution of them cannot be proved; and the reason given is that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion and dishonesty." Stated in substance, the rule given by Phillips is this: If an instrument is thirty years old, and is proved to have come from a proper place of custody, it may be admitted in evidence without any proof of its execution. Such an instrument is said to prove itself. 2 Phil. Ex. 475. There is proof in this case that the deeds under consideration came from the proper custody. A son of James Johnson, to whom the land in controversy was conveyed in 1836, and who retained the title until 1880, swears that he saw the deeds in his father's possession as far back as he can remember. He was thirty-eight years old at the time he testified. He also said that he had seen the deeds frequently during his father's life, and looked them over, but would not say that he had ever read them entirely through. He was sure, however, that they were the same two deeds which he had seen in his father's possession, because of certain distinguishing marks, which he mentioned, and also because he found them among his father's papers after his father's death. He also testified that he delivered the deeds to the persons who afterwards passed them to the defendant. The foregoing summary shows, I think, that three facts tending to demonstrate the authenticity of the deed may be considered proved: *First*. That the deed has been in existence for nearly one hundred years. *Second*. The possession of the deed by James Johnson, to whom the land was conveyed in 1836, warrants the belief that, whenever the title to the land changed, the deed was delivered to the

person taking title as a muniment of his title. And, *third*, there have been three different assertions of title to the land under the deed,—the first in 1790, when Lawrence conveyed to Price; the second in 1813, when Price conveyed to Price; and the third in 1836, when Price conveyed to Johnson. The first of these,—that which was made in 1790,—it will be observed, was made so near the time when the deed on trial was executed that it is highly probable John Curtis heard of it. It is scarcely possible to believe that he did not. He was then living in the neighborhood where the transaction occurred. He did not die until 1813 or 1813. The deed of 1790 was executed in the presence of three witnesses. This fact shows that no effort was made to conceal its execution, but the effort was rather in the opposite direction—to give publicity to it. Such transactions, even at this day, in sparsely-populated neighborhoods, attract public attention, and form the subject of conversation wherever men meet. This was undoubtedly the case in 1790, when such transactions were much less frequent than they are now, and when they doubtless excited much greater general interest than they do now. It thus appears, as I think, that when we come to take an account of the probabilities of the case, the mind is naturally led to believe, from the facts in evidence, that John Curtis must have heard of the conveyance of 1790, and that he did not attempt to defeat it, because he knew that Joseph Lawrence, in conveying the land, had simply done what he had a lawful right to do.

The rule as to what evidence, in addition to proof of antiquity and that the deed comes from a proper source, is required to justify the admission of an ancient deed in evidence, without proof of execution, is not entirely settled in this country. The cases are entirely harmonious to this extent: that where possession of the land has accompanied the deed, that fact furnishes sufficient evidence of its authenticity to justify its admission, but, where possession has not accompanied the deed, the cases are not entirely agreed as to what proof, other than proof of possession, will be sufficient to justify its admission. Professor Greenleaf says that where possession has not accompanied the deed, to justify its admission there must be other equivalent or explanatory proof. 1 Greenl. Ev., § 144. The rule as thus stated seems to have met the approval of Chief Justice Green; for, in *Osborne v. Tunis*, 25 N. J. Law, 633, 663, he, in effect, said: The presumption that an ancient deed is genuine only arises in case the deed comes from the proper depository and is accompanied and followed by possession, or in case there is other collateral proof to warrant the belief that the deed is genuine. Chief Justice Bronson, in *Wilson v. Betts*, 4 Denio, 201, 213, 215, said that other facts besides possession might be sufficient to raise the presumption that an ancient deed was genuine, but he thought that nothing would justify such presumption but acts done under the deed or the recognition of its validity by those having an interest in the other

direction. What is called "explanatory" or "collateral proof" in some of the cases was defined in *Jackson v. Larroway*, 3 Johns. Cas. 283, 285, as follows: Such account must be given of the deed as may reasonably be expected under all the circumstances of the case, and as will afford a presumption that it is genuine. This definition has been approved in several cases. 2 Phil. Ev. (4th Am. ed.) 475, note 430, by Cowan & Hill. The supreme court of the United States, speaking by Judge Story, held, in *Barr v. Gratz*, 4 Wheat. 213, 221, that where a deed is more than thirty years old, and is proved to have been in the possession of the lessors of the plaintiff in ejectment, and actually asserted by them as the ground of their title in a chancery suit, it is, in the language of the books, sufficiently accounted for, and it is admissible in evidence without regular proof of its execution. The rule, as thus stated, was reiterated by the same court in *Coulson v. Walton*, 9 Pet. 70, 72. The proof in support of the authenticity of the deed on trial comes up, in my judgment, to the required standard. Such an account has been given of it as was reasonably to be expected under the circumstances of the case, and as leads naturally to the presumption that it is genuine. Neither party has shown possession; on the contrary, both admit that the land has been vacant for a century, so that possession speaks neither for nor against the deed. But the proofs show that just such use has been made of it, and that just such claims have been made under it, as would, in the usual and ordinary course of such transactions among men at a very early day, have been made, had the persons dealing with it known it to be an honest paper. It has been dealt with, treated and preserved as an honest and valid paper. In addition to this, as I think, the paper bears on its face strong evidence of its integrity. In my judgment, it should be admitted in evidence and full effect given to it. There is an interlineation apparent on the face of the deed. This, it is said, so greatly discredits it that no effect should be given to it. As originally drawn, the deed described the land conveyed as that undivided half of the one-seventh of Sgan beach which David Curtis left to his son John, without saying whether the half which it conveyed was the half of that seventh which Elisha Lawrence had conveyed to the testator, or the half of the seventh conveyed to the testator by Benjamin Lawrence. The half of the seventh conveyed to the testator by Benjamin Lawrence, it will be remembered, was devised to John absolutely, with an immediate right to possession, while the whole of the one-seventh conveyed to the testator by Elisha Lawrence was devised, in the first instance, to Elisha Curtis, and the heirs of his body lawfully begotten, with a limitation over to John of the one-half of that seventh, in case Elisha Curtis did not have an heir of his body. As originally drawn, the deed described the land which it conveyed as that half of an undivided seventh of Sgan beach which David Curtis left to his son John. With this description unchanged, there can be no doubt, I think,

that the deed would have passed that half of the one-seventh in which John had a present absolute estate, and not the half of the other seventh in which his estate was liable to be defeated by the birth of issue to his brother Elisha. The interlineation changed this description, and made the deed say that the land which it passed was the half of that seventh part of Sgan beach which David Curtis bought of Elisha Lawrence by deed bearing date July 9, 1779. The effect of the interlineation was to change entirely the land upon which the deed was to operate, and to pass the grantee an estate, which, though vested, was nevertheless subject to a life estate, and liable, in addition, to be completely destroyed by the birth of a child, instead of a present absolute estate which no future event could defeat. This fact would seem to make it as certain as anything can be, in the absence of convincing proof to the contrary, that neither the grantee nor any one claiming under him inserted the interlineation after the delivery of the deed. As to the land in dispute, the complainant's bill must be dismissed.

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## CHAPTER XXII.

### CONVEYANCES INTER VIVOS.

#### Jackson ex dem. Gouch v. Wood.

Decision by Supreme Court of Judicature of New York, January Term, 1815. Opinion by Platt, J.

(Reported in 12 Johns. 73.)

The single question in this case is, whether an estate in fee can be conveyed otherwise than by deed; that is to say, whether a seal is essential to such conveyance.

The earliest mode of transferring a freehold estate, known in the English common law, was by livery of seisin only. Co. Litt. 48b, 49b. But when the art of writing became common among our rude ancestors, the deed of feoffment was introduced, in order to ascertain with more precision the nature and extent of the estate granted, with the various conditions and limitations. This deed, however, was of no validity, unless accompanied by the old ceremony of livery and seisin. 2 Bl. Comm. 318.

The statute of uses (27 Hen. VIII.) gave rise to the deed of bargain and sale; and, soon afterwards, the conveyance by lease and release was introduced, in order to avoid the necessity of enrolment, required by the statute of 27 Hen. VIII. 2 Bl. Comm. 343. By virtue of the statute of uses, which we have adopted (without the proviso in the English statute requiring the enrolment of deeds), the deed of bargain

and sale, now in use here, is equivalent to the deed of feoffment with livery of seisin (2 Bl. Comm. 339, 343), and has, in practice, superseded the lease and release.

By the common law, estates less than a freehold might be created or assigned, either by deed, by writing without seal, or by parol merely.

By 29 Car. II., c. 3 (9th and 10th sections of our "act for the prevention of frauds"), (a) it was enacted, "that all leases, estates, interest of freehold, or terms of years, or any uncertain interests in lands, etc., made or executed by livery and seisin only, or by parol, and not in writing, and signed by the parties so making and creating the same, shall have the force and effect of leases or estates at will only; except in leases for three years and less," etc.; and, "that no leases, estates, or interests, either of freehold, or terms of years," etc., "in any lands," etc., "shall, at any time hereafter, be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same," etc.

Now, it is contended on the part of defendant that the common-law mode of conveyancing has been so modified by this statute as to destroy the distinction between an estate of freehold and an estate less than a freehold, as it regards the mode of alienation; and that either may now be conveyed by "note in writing" without seal, as well as by deed.

No direct decision appears to have been made on this point; but in the case of *Fry v. Phillips*, 5 Burrows, 2827, and in the case of *Holliday v. Marshall*, 7 Johns. 211, it was decided that a written assignment of a lease for ninety-nine years was valid, though not sealed; upon the express ground that it was the sale of a chattel-real, for which the statute of frauds requires only a "note in writing," plainly recognizing the distinction between a term for years and a freehold estate, as to the mode of conveyance.

According to Sir William Blackstone (2 Bl. Comm. 309), etc., sealing was not in general use among our Saxon ancestors. Their custom was, for such as could write, to sign their names and to affix the sign of the cross; and those who could not write made their mark in sign of the cross, as is still continued to this day. The Normans used the practice of sealing only, without writing their names, and, at the Conquest, they introduced into England waxen seals, instead of the former English mode of writing their names and affixing the sign of the cross, it being then usual for every freeman to have his distinct and particular seal. The neglect of signing, and resting upon the authenticity of seals alone, continued for several ages, during which time it was held, by all the English courts, that sealing alone was sufficient. But in the process of time the practice of using particular and appropriate seals was, in a great measure, disused; and Sir William Blackstone (2 Bl. Comm. 310) seems to consider the statute of 29 Car. II., c. 3 (of which the ninth and tenth

sections of our statute of frauds are a copy), as reviving the ancient Saxon custom of signing, without dispensing with the seal, as then in use, under the custom derived from the Normans.

We have the authority of that learned commentator, unequivocally in favor of the opinion that a seal is indispensable in order to convey an estate in fee simple, fee tail, or for life. 2 Bl. Comm. 297, 312.

Such seems to have been the practical construction ever since the statute of Car. II, in England, and under our statute of frauds in this state; and to decide now that a seal is unnecessary to pass a fee would be to introduce a new rule of conveyancing, contrary to the received opinion, and almost universal practice in our community, and dangerous in its retrospective operation. Construing this statute with reference to the pre-existing common law and the particular evil intended to be remedied, I think the legislature did not intend to dispense with a seal where it was before required, as in a conveyance of a freehold estate; but the object was to require such deeds to be signed also, which the courts had decided to be unnecessary.

I construe this statute as though the form of expression had been thus: "No estate of freehold shall be granted unless it be by deed signed by the party granting; and no estate less than a freehold (excepting leases for three years, etc.) shall be granted or surrendered unless by deed, or note in writing signed by the grantor."

This venerable custom of sealing is a relic of ancient wisdom and is not without its real use at this day. There is yet some degree of solemnity in this form of conveyance. A seal attracts attention, and excites caution in illiterate persons, and thereby operates as a security against fraud.

If a man's freehold might be conveyed by a mere note in writing, he might more easily be imposed on, by procuring his signature to such a conveyance, when he really supposed he was signing a receipt, a promissory note, or a mere letter.

The plaintiff is entitled to judgment. Judgment for the plaintiff.

### Leonard v. White.

Decision by Supreme Judicial Court of Massachusetts, September Term, 1810. Opinion by Sedgwick, J.

*(Reported in 7 Mass. 6.)*

It is not contended in this case, on the part of the plaintiff, that the conveyance mentioned in the report does not operate as the grant of an easement for the accommodation of the mill, by means of the way which has been mentioned; but it is contended that it cannot be considered as a grant of the soil over which the way passed; and, on the

other side, it is insisted that the deed ought to be considered as a grant of the land.

It is agreed that the *locus in quo* is not within the lines designating the limits of the grant. And as the seisin of the defendant and his wife in the land is put in issue, the question is whether the soil was conveyed by the expression "with the appurtenances thereon."

An appendant or appurtenant is a thing used with, and related to, or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant. Co. Litt. 121*b*, 122*a*. The way, then, as an easement, might be appendant or appurtenant to the mill; but the soil, over which the way went, could not.

An appendant is that which, beyond memory, has belonged to another thing more worthy, and which agrees with that to which it is related, in its nature and quality; and an appurtenant is that the commencement of which may be known. Co. Litt. 121*b*; Com. Dig., "Appendant and Appurtenant," A. Appendances and appurtenances will pass by the words "with the appurtenances thereunto belonging," or by other tantamount expressions.

By the grant of a messuage, *cum pertinentiis*, a shop, annexed to it for thirty years, does not pass, unless it be found to be a parcel of the messuage. Cro. Car. 17. By the grant of a house or land, *cum pertinentiis*, another house or land does not pass, unless it be found to be a parcel. 1 Lev. 131. By the grant of a mill, *cum pertinentiis*, the close where the mill is, or the kiln there, does not pass without some further expression. 1 Sid. 211; 1 Lev. 131. Land cannot be appended to land. 1 Rolle, 230, l. 50. Nor can it be appendant to a meadow or messuage. Plowd. Comm. 170*b*. So a meadow cannot be appurtenant to a pasture, nor a pasture to a wood. Plowd., *ubi supra*.

From these authorities it is evident that the deed in question did not convey the soil, over which the way went, to the defendant and his wife; and, therefore, will not support this issue on his part.

Nor can the defendant better avail himself of the deed of the devisees of Asaph Leonard to him, inasmuch as it is a conveyance to himself alone, whereas his plea sets up a joint seisin in himself and his wife; and, further, this last deed is subject to the same objections as that which has been already considered; there being no pretense that the soil in the *locus in quo* was conveyed by this latter deed, except as appurtenant to the subject of the grant.

We are, for the reasons which have been given, all of opinion that the direction, and the finding of the jury, upon this issue were right.

Judgment on the verdict.



## CHAPTER XXIII.

## COMPONENT PARTS OF DEEDS.

**Gould v. Howe.**

Decision by Supreme Court of Illinois, January 21, 1890. Opinion by Scholfield, J.

*(Reported in 131 Ill. 490.)*

Two questions only are presented for our decision by the arguments made upon this record: (1) Does the plat of the Illinois Central Railroad Company vest the fee of the streets and alleys marked thereon in the corporation of Wenona? (2) Do the words "reserving streets and alleys according to the recorded plat of the town of Wenona," in the deed of the Illinois Central Railroad Company to Hill, prevent the transfer of the fee in such streets and alleys, subject to the easement of the public therein, by that deed?

1. Bearing in mind that acknowledgments of instruments affecting title to, or interests in, realty were unknown to the common law, and are purely of statutory origin, it will be obvious that whether, in a given case, an acknowledgment is defective depends entirely upon whether it is taken and certified in the manner and by the person within the contemplation of the statute. The statute in force when this plat was made was the Revision of 1845. By that revision one mode is provided for taking acknowledgments of town plats, and another and different mode is provided for taking acknowledgments of deeds and other instruments for the conveyance of real estate. The former are to be acknowledged before "a justice of the supreme court, justice of a circuit court or a justice of the peace," while the latter are to be acknowledged before "any judge, justice or clerk of any court of record in this state having a seal, any mayor of a city, notary public or commissioner authorized to take the acknowledgment of deeds, having a seal, or a justice of the peace." See sec. 16, ch. 24, and sec. 20, ch. 25, R. S. 1845; 1 Purple, St. 1856, pp. 156, 176; Gross, St. 1868, pp. 103, 118, §§ 16, 20. It may be that there is nothing in the character of the instruments which would preclude a uniform system of acknowledgment for all; and we may concede that it would therefore have been competent for the general assembly to have so provided, either by assigning that duty to courts, to persons exercising *quasi*-judicial powers or to persons arbitrarily selected and named for that purpose without reference to any official position; but it would have been equally competent to have dispensed with acknowledgments altogether, and, in the matter of town plats, to have provided that the simple causing of the

plat to be made and recorded should *ipso facto* vest the fee of the streets and alleys in the municipality, without reference to any acknowledgment whatever. But these are all legislative questions, with which we have nothing to do; it being our province solely to inquire, What has the general assembly enacted in this respect? not, Why has it enacted it? In the enactments referred to *supra*, the general assembly did not assume to vest the power to take acknowledgments in persons exercising the same classes or grades of powers; for there is no more dissimilarity between the powers exercised by any officers under our government than between those exercised by the judges, mayors, notaries, clerks, commissioners and others who are empowered to take acknowledgments of deeds. The enumerated officers are empowered to take acknowledgments of deeds, not because the act of taking acknowledgments is germane to any particular power inhering in the offices they hold, but simply and only because the general assembly has, in the exercise of plenary legislative authority in that respect, arbitrarily designated them for that purpose, just as it has since designated masters in chancery, and might have designated aldermen and constables. The language of the statute in relation to the acknowledgment of plats, to which we have referred, is first found in an act approved January 4, 1825 (Compilation 1830, p. 184), and it remained unchanged until the revision of 1874. The language of the statute in relation to the acknowledgment of deeds and other conveyances of real estate has, however, often been changed so that different acknowledgments may have been properly taken from time to time, before persons who had no authority to take acknowledgments at prior times. Thus, by the act in relation to conveyances, approved January 31, 1827 (Rev. Laws 1827, p. 98, § 9), deeds and other conveyances of real estate were required to be acknowledged before "one of the judges of the supreme or circuit court of this state, or before one of the clerks of the circuit court, . . . or before one of the justices of the peace of the county;" and it was not until two years after that statute was in force that the legislature enacted, by an amendment approved January 23, 1829 (Laws 1829, p. 24, § 1), that notaries public, mayors and certain other designated officers should, in addition to those enumerated therein, be empowered to take acknowledgments. No one will pretend that the acknowledgment of a deed before a notary public or a mayor, taken before the 23d of January, 1829, could have had any validity; and this, for the plainly obvious reason that no power to take acknowledgments was conferred upon a class of officers to which they belonged, nor upon them by specific designation; and precisely the same is to be said of the acknowledgment of this plat before a notary public. The power confessed by the statute in relation to conveyances does not extend beyond the class of instruments which are the subject of that statute; and the statute in relation to town plats neither expressly nor by necessary implication includes notaries public. By the revision of 1874, the

general assembly has provided that town plats are to be "acknowledged in the same manner that deeds of land are required to be acknowledged;" but this is palpably a radical amendment and change of the prior law, and it has no retroactive effect. It necessarily follows that, in our opinion, the acknowledgment of the plat before the notary was a nullity, and the plat, therefore, did not operate to vest the fee of the streets and alleys in the municipality. See also *Gosselin v. Chicago*, 103 Ill. 623; *Thomas v. Eckard*, 88 Ill. 593.

2. While the plat was not a conveyance of the fee, it was evidence tending to prove a common-law dedication, which we have held vests an easement in the streets and alleys in the municipality. *Railroad Co. v. Hartley*, 67 Ill. 439; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. R. 866. It is often difficult to distinguish between an exception and a reservation in a deed, and the words "reserving" or "excepting" are not conclusive in determining which is intended. The character and effect of the provision itself, in which such words occur, must determine what is intended. It is sufficient, for the present, to say that an exception in a deed withholds from its operation some part or parcel of the thing which, but for the exception, would pass, by the general description, to the grantee. A reservation in a deed, on the other hand, is the creation of some new right issuing out of the thing granted, and which did not exist before as an independent right in behalf of the grantor, and not of a stranger. *Co. Litt.* 47*a*; 1 *Shep. Touch.* 77, 80; 2 *Washb. Real Prop.* (2d ed.), pp. 646, 693, § 67; *Tied. Real Prop.*, § 843. If here there had been no public easement in the streets and alleys, and the company had desired to retain for its servants and employees a private way across the land conveyed, it would have been a reservation; it would have been the creation of a new right, issuing out of the thing granted, in behalf of the grantor. But the streets and alleys were already in existence. The municipality had an easement in them for the public. The land occupied by them was included by the terms of the deed in the general description of the property conveyed, and hence, but for the provision withholding them from its operation, they would have been included in the grant. *Beach v. Miller*, 51 Ill. 207. The language of the deed could only be held to withhold the fee of the streets and alleys from its operation upon the hypothesis that, "according to recorded plat of town of Wenona," the fee of the streets and alleys is vested in the municipality, for that is the measure of what is withheld from the operation of the deed; and therefore, since "according to recorded plat of town of Wenona" an easement only in the soil of the streets and alleys is vested in the municipality for the use of the public, that only is withheld from the operation of the deed. Nothing, therefore, was retained in the railroad company which could subsequently pass by its quitclaim; and when the alley was vacated the easement was terminated, and there was nothing to revert to the railroad company. The judgment is affirmed.

## Cole et ux. v. Kimball.

Decision by Supreme Court of Vermont, March Term, 1880. Opinion by Royce, J.

(*Reported in 52 Vt. 639.*)

STATEMENT OF FACTS.—Covenant. The declaration counted on a covenant against incumbrances in a deed from the defendant to the plaintiff Florette. The case was referred, and the referee reported in substance as follows: On August 26, 1871, the defendant by warranty deed containing the usual covenants, including a covenant against incumbrances, conveyed to the plaintiff Florette certain premises in Braintree that had been conveyed to him by Mansel Heselton and wife; and said Florette, in payment therefor, conveyed to the defendant a farm which had before been conveyed to her by her father, Leonard Fish, and with her husband executed to him a promissory note for \$462, which said Leonard afterwards paid. On June 11, 1872, the plaintiffs by like deed conveyed the premises to Lucia M. Fish, the mother of said Florette, and wife of said Leonard. The premises, when conveyed by the defendant as aforesaid, were subject to a mortgage executed by Heselton and wife to Elihu Hyde in 1869, conditioned for the payment of two promissory notes for \$250 each, payable in one and two years respectively, with interest, one of which only had been paid. In December, 1875, Hyde brought a petition for foreclosure against the Fishes and others, but not against the Heseltons nor the Coles, and in the following January obtained a decree for \$313.29, the sum due in equity, and \$28.55 costs, to be paid before January 1, 1877, with interest. On November 1, 1876, Hyde sold and assigned that decree to Ephraim Thayer for \$350, Thayer acting therein for said Leonard and at his request; and afterwards, and before this action was brought, said Leonard, acting therein for his wife, paid Thayer the amount of the decree in full, with interest. The conveyance from said Leonard to said Florette, and from her to said Lucia, were without consideration, and they and the holding of title by said Florette were for the convenience and at the request of the Fishes, said Leonard doing all the business in connection therewith, and the plaintiffs having nothing to do with it, except to execute deeds, etc., as desired. This action was brought and prosecuted by said Lucia, in her own behalf and for her own benefit, and with the privity and consent of said Leonard. The referee found that if the plaintiffs were entitled to recover, they should recover \$341.84, with interest from January 1, 1876. While the action was pending the Fishes, in consideration that final judgment should ultimately be rendered therein for the plaintiffs for the full amount of damages found by the referee, filed in court a release of the defendant from all causes of action that they or either of them had, or could have, in their own

names to recover damages consequent on a breach of any of the covenants in his deed to said Florette. The court at the December term, 1879, Powers, J., presiding, rendered judgment on the report for the plaintiffs for nominal damages and costs; to which the plaintiffs excepted.

OPINION.—It is conceded that the plaintiffs are entitled to nominal damages; and the only question made is whether, upon the facts found by the referee, they are limited to the recovery of such damages, or are entitled to recover the amount paid to redeem the premises from the Hyde decree. This suit was brought and prosecuted by Lucia M. Fish, for her benefit, with the privity and consent of her husband, Leonard Fish, who acted for her in paying the money to redeem the premises from the Hyde decree. Florette D. Cole held the title to the premises conveyed to her by the defendant as the trustee of Leonard and Lucia M. Fish, and the covenants contained in the deed from the defendant to Florette D. are in equity to be treated as covenants for the benefit of the *cestuis que trust*. All the interest that Florette D. had in said covenants passed to Lucia M. Fish by the deed from the plaintiffs to her. The defendant is liable on the covenants in his deed to protect the title against the incumbrances that were upon the premises described in the deed at the time of its execution. The covenant against incumbrances runs with the land, and can be enforced for the benefit of the party holding the legal title. The payment of the amount due on the Hyde decree was not a voluntary payment, but a compulsory one. Fish was obliged to make it to save his title to the premises. The claim to indemnity on account of the breach of the covenants of title and against incumbrances was a chose in action, and was transferred to Lucia M. Fish by the deed from the plaintiffs to her; and the assignee of a chose in action has the right (subject to the right of the assignor to require indemnity against costs) to sue in the name of the assignor. It is a matter of indifference to the defendant to whom he pays, if he is fully protected against any further liability. It is not claimed that there is any other party but Leonard Fish and wife that could make any claim against the defendant on account of his covenants; and the discharge filed in the case is a full protection against any claim that they might otherwise make. The rule of law that limits the recovery in actions of covenant against incumbrances to the amount paid to remove the incumbrance was adopted for the protection of the covenantor, for until full payment the liability of the covenantor would continue. The cases relied upon by the defendant differ from this in the important fact that in none of those cases did it appear that the suit was being prosecuted for the benefit of an assignee who had been compelled to make payment to save his estate, and full indemnity had been tendered to the covenantor. The attempted defense is purely

technical; and it does not appear that any defense which the defendant might have made if the suit had been in the name of Leonard Fish and wife was not equally available to him in the present suit. In *Smith v. Perry*, Adm'r, 26 Vt. 279, the plaintiff had not paid the judgment recovered by his grantee on account of the breach of his covenant of title, but the court allowed a full recovery to be had, protecting the defendant's estate against further liability by the form of the judgment rendered. Here, as we have seen, the defendant is protected by the discharge filed.

Judgment reversed, and judgment for the largest sum.

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